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CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY AND THE DEPARTMENT OF JUSTICE

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CONFIRMATION HEARING ON: MELVIN T. BRUNETTI AND ALICE M. BATCHELDER

WEDNESDAY, MARCH 6, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (committee chairman) presiding.

Also present: Senators Metzenbaum, McConnell, and Laxalt.

Staff present: Duke Short, chief investigator; Frank Klonoski and Joe Kopka, investigators; and Ruth Lucas, investigative clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met this afternoon to hold hearings on several judges. One of these is Melvin T. Brunetti of Nevada to be a U.S. circuit judge for the ninth circuit.

Senator Laxalt and Senator Hecht are both here, and I know how busy you Senators are and we will be delighted to hear from you at this time.

Senator Laxalt, would you care to speak in behalf of Mr. Brunetti?

Senator LAXALT. I thank the Chair and Senator Metzenbaum. I think I would like to yield at this time to my colleague, Senator Hecht, and then I will close, if that is appropriate.

The CHAIRMAN. Senator Hecht, we are glad to have you here.

STATEMENT OF HON. CHIC HECHT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator HECHT. Thank you, Mr. Chairman, and Senator Metzenbaum.

Senators of the distinguished Judiciary Committee, I am very honored and privileged to come before you today and recommend that you favorably consider the nomination of Melvin Brunetti for the position of U.S. circuit judge for the Ninth Circuit in the State of Nevada.

Upon the completion of his legal education in 1964, Mel returned to Nevada to begin a long and successful legal career. His success and outstanding reputation in the legal community are a result of hard work, conscientious attention to detail, and his incisive legal skills. Throughout his career, Mel has continued to advance his expertise and contribute to the legal profession through a number of professional organizations. He currently serves as president of the State Bar of Nevada as well as serving, in his 10th year, on the State bar's board of governors.

In conclusion, Mr. Chairman, I strongly recommend Melvin Brunetti as a U.S. circuit judge for the Ninth Circuit in the State of Nevada. His diligence and thorough background in the legal profession, combined with his familiarity with the State of Nevada and its issues, will make him an outstanding circuit court judge.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Laxalt, I am glad to hear from you.

STATEMENT OF HON. PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator LAXALT. I thank the Chair and I thank my colleague, Senator Hecht, for his support of Melvin Brunetti.

Mr. Chairman, this is one of those occasions when the work we do up here on the Hill is at its most satisfying. As a longtime friend and admirer of Mr. Brunetti, I am enormously pleased that President Reagan has recognized his abilities and accomplishments. We, in Nevada, have been aware of them for a long while.

As a Senator who considers our part in the judicial confirmation process a top priority—and those of us on the committee certainly feel that way—I am proud that the bench is about to gain such a distinguished and able public servant.

The role of a Federal circuit judge is enormously important—indeed, perhaps more important today than the framers of our Constitution might have ever imagined or desired. Given the burdens now assumed by the Federal judiciary and the power residing in that branch, it is imperative that the President nominate for such posts men possessed not only of sound temperament and great legal acumen, but also of a keen appreciation for the courts' proper scope in our democratic system of government. Mel Brunetti is such a man.

A second generation Nevadan, he graduated from Sparks High School and then took on a wide variety of jobs to support his studies at the University of Nevada in Reno. There he concentrated on electrical engineering and accounting before moving on to Hastings College of Law, from which he received his J.D.

The success of the legal career that followed and Mel's commitment to the public good are both demonstrated by his decade long service on the Board of Governors of the State Bar of Nevada. His tenure on the Board is capped by his current service as president of the State bar, in which capacity he has been most effective in ensuring continued excellence in the legal practice throughout Nevada.

He is also active in several specialty sections of the ABA, in the Northern Nevada Trial Lawyers Association, and in the Association of Trial Lawyers of America.

He is presently a partner in the fine Carson City law firm of Allison, Brunetti, MacKenzie, Hartman, Soumbeniotis & Russell—a firm, incidentally, Mr. Chairman and members of the committee, that I helped to found a 100 years ago. Mel Brunetti is known across the State not only as a preeminent lawyer, but as a fair and good man of absolute and total integrity.

Senator METZENBAUM. And a brilliant man in choosing the right partner.

Senator LAXALT. I think that may be right. That is highly appreciated.

He is blessed with an outstanding, very free-thinking wife whom we all love and respect and three beautiful children.

So as members of the committee will undoubtedly perceive, Mr. Chairman, my endorsement of Mel Brunetti for the ninth circuit bench is warm. It is unqualified. It is professional, and highly personal.

Indeed, as I have often stated back in my home State, if it were not for Mel Brunetti, I would in all probability still be in private life. It was he, at a critical time, who was most persuasive that I should run for the Senate after I had left politics. Since that was the Watergate year, his sense of political timing may be open to question—but never his sincerity and genuineness of purpose.

He is a man rooted in the best values of our Nation and in the best values of the West and our State. I believe, Mr. Chairman and members of the committee, he will serve with great distinction and with the proper restraint. I am honored as his friend and as his colleague to introduce him to this committee and to urge strongly his prompt confirmation.

I thank the chairman and members of the committee.

The CHAIRMAN. Thank you very much.

Mr. Brunetti, I congratulate you upon your appointment by President Reagan. I congratulate you upon the high endorsement that Senator Laxalt and Senator Hecht have given you. You could not have two Senators who are held in higher esteem around here than those two gentlemen. Senator Laxalt is known to be the closest Member of the Senate to the President, has tremendous influence here. Senator Hecht is a new man and he has made an indelible impression here, and they are both held in the highest esteem by their colleagues.

I am sure they are busy and want to leave, so we will hear from Senator Metzenbaum in a few minutes and the congressmen about the person they are endorsing.

Senator Laxalt, if you and Senator Hecht wish you may stay; if you do not want to, please feel free to leave when you want to.

Senator LAXALT. I thank the Chairman and the members of the committee.

The CHAIRMAN. Mrs. Batchelder, come out and have a seat.

Senator Metzenbaum is here. He is a member of this committee, a highly esteemed gentleman, and the Congressman, I understand from your district may be here. Is he here?

Congressman McEwen, is he here?

Mrs. BATCHELDER. Senator, I had hoped that Congressman McEwen would be able to be here, but it does not appear that he is.

The CHAIRMAN. We will be glad to hear from Senator Metzenbaum because he cannot remain through the entire hearing.

Senator Metzenbaum.

STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **Metzenbaum**. I cannot remain. There is a Budget Committee hearing, Mr. Chairman.

But I have made a very exhaustive research study into the qualifications of our candidate for the judiciary, the Honorable Alice Batchelder. In fact, it has been so exhaustive that I even inquired of Billy, her son, and Elisabeth, her daughter. Billy is 10 and Elisabeth is 6, and I asked them if they thought that she would be an O.K. judge, and they told me that they felt that she would be.

The **Chairman**. And they recommend her?

Senator **Metzenbaum**. They recommend her and they said she would be fair. I did not ask Representative William Batchelder that question. I am not sure what his answer would have been, but I will take it on the word of the children that she will be fair and she will be a very able and qualified judge and that they are for her.

As a matter of fact, she does have a distinguished record. From 1971 until 1983 she was in the private practice of law, and during that time Judge Batchelder regularly represented on a pro bono basis individuals who were unable to pay for legal services. In addition to her law practice she devoted many years to the reorganization of the county mental health board and her hard work and efforts have rewarded many Ohio residents who use these facilities each year.

I might say to the Chair parenthetically that at an early point in my own career when I had the opportunity and the President was listening to me on my recommendations as to who should be the Federal judge or not be the Federal judge, that I looked negatively upon the candidacy of a particular individual whose name will not be mentioned because he had not been involved in the community at all. I do believe that members of the judiciary have to be more qualified not only with respect to the concerns of the law, but must also be concerned with the community. So, I am particularly pleased that Judge Batchelder has been involved both in the pro bono practice of law as well as in connection with the county mental health board. Since 1983 she served as the U.S. bankruptcy judge for the Northern District of Ohio and has done so with distinction.

I might say that one of her early cases or rather one of her early decisions had to do with the interpretation of the Bankruptcy Act that you and I worked so hard on, having to do with the question of——

Mrs. **Batchelder**. Interim relief from a collective bargaining agreement, Senator.

Senator **Metzenbaum**. You and I were very much involved in that, Mr. Chairman, and her decision was a forerunner of the other decisions in that particular area.

I might also say that she is only the second woman to be appointed or nominated to the position of U.S. district court judge in the history of the State of Ohio, and I am sure that she will do a particularly able job.

I am happy to welcome her to this committee hearing and to recommend her to you, Mr. Chairman, and the other members of the committee with our recommendation that she be sent to the floor with approval.

The CHAIRMAN. Thank you very much, Senator.

I want to congratulate you, Judge Batchelder, upon your appointment by the President and upon your approval by both Senators from Ohio. We appreciate the senior Senator from Ohio who is here now, Senator Metzenbaum. He is a very able member of this committee and it is well to have him on your side. I found that out in the committee, and he and I have worked together on a lot of things.

Senator McConnell, we will be glad to hear from you, on either one of these nominations.

STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator McCONNELL. I just wanted to commend Mr. Brunetti and Judge Batchelder for their nominations by the President and tell you that I am, like a lot of others, going to another session, but I congratulate both of you and I am confident that the hearings will reveal that we should support both of you and wish you well in your career on the judicial bench.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

If you will step back, we will call Mr. Brunetti again.

If you will both stand up and take the oath at one time, it will save time. Raise your right hands.

[Whereupon, the nominees were duly sworn.]

The CHAIRMAN. Mr. Brunetti, if you will, please come around. You have members of your family here. Would you like to introduce them?

Mr. BRUNETTI. Yes, Mr. Chairman.

My wife Gail Brunetti is here and I would like to introduce her at this time, please.

The CHAIRMAN. We are glad to have you.

Do you have any friends you want to introduce?

Mr. BRUNETTI. Yes. We have one of our friends, Pamela Robinson, and another friend, Tom Weisner.

The CHAIRMAN. We are glad to have you all here.

Mr. Brunetti, I believe you graduated in law in 1964.

Mr. BRUNETTI. That is correct.

The CHAIRMAN. From the University of California?

Mr. BRUNETTI. Yes, sir.

The CHAIRMAN. You were in the Army National Guard from 1954 to 1956. Are you still in the National Guard?

Mr. BRUNETTI. No. I was honorably discharged, I believe in 1956.

The CHAIRMAN. Why did you get out?

Mr. BRUNETTI. I was drafted for military service and applied for active duty, and I went out to report in and they gave me a physical and classified me as having something wrong with my feet, and I got a 1-Y classification. So they discharged me out of the National Guard too.

The CHAIRMAN. You do not think that will affect you in your judicial duties, then?

Mr. BRUNETTI. Not at all. [Laughter.]

The CHAIRMAN. I notice you have been associated with several law firms here and you seem to have done well in your law practice.

Now, Mr. Brunetti, you have been a practicing attorney since 1964, I believe, and you have been nominated for the position here of circuit judge for the ninth circuit. What do you feel will be the most rewarding aspect of serving in this position?

Mr. BRUNETTI. Well, I have been practicing for 20 years and I have devoted myself to the practice of law, and it seems to me that when the opportunity came and the confidence was expressed by Senator Laxalt to name me and the President to nominate me that I could contribute something permanent and lasting to the profession, to society and to the administration of justice, just something good to do, and I think I can contribute.

The CHAIRMAN. Mr. Brunetti, there is frequently a conflict between the deeply felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Mr. BRUNETTI. Well, if personal jurisprudence is the way I think about the law, I would hope that my experience and background would help me in analyzing legal problems and making good decisions; but, on the other hand, I am bound by the precedents of the U.S. Supreme Court, which is the law of the land. There may be other precedents cited to me in cases, and in applying the facts and the law I am going to have to observe precedent. However, if that precedent may be unconstitutional, I am going to uphold the Constitution and I think in that type of a case the precedent would have to be overruled.

The CHAIRMAN. I presume you would not hesitate to overrule a precedent if you felt the precedent was not in accord with the Constitution and not in the best interest of the people of the Nation.

Mr. BRUNETTI. Or the best interest of the people, which is what the Constitution is to preserve and I certainly would overrule it.

The CHAIRMAN. Mr. Brunetti, how does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions such as the due process or equal protection clauses?

Mr. BRUNETTI. Well, the 14th amendment has been used widely in our modern times, and I believe that the Constitution is a very simple and concise document. Maybe that is why there is a lot of interpretation and maybe that is why there may be a little bit of conflict. I think that the due process clause and the equal protection clause are necessary to protect our freedoms and to protect our rights. However, as a judge, in doing that I cannot be a judge that would step on the separation of powers between the executive and the legislative branches. So when you are looking at the individual rights and our freedoms that we value in this country, those have to be protected, but certainly we have to respect the other branches of Government; and as long as their actions are constitutional, they cannot be stepped on by the courts.

The CHAIRMAN. Judge Brunetti, I believe Thomas Jefferson wrote shortly after the ratification of the Constitution that our Nation's particular security is the possession of a written Constitution and "Let us not make it a blank paper by construction."

What do you think he meant by that language, "Let us not make it a blank paper by construction"?

Mr. BRUNETTI. Well, I believe that we are a nation of laws and the Constitution is a beautiful document which protects our country and our freedoms. I took an oath as an attorney and if the Senate sees fit to confirm me I would take an oath as a judge to uphold the Constitution, and as such I do not believe you can interpret away the Constitution. You have to protect the people and the rights, but the Constitution is what makes us different maybe from those people who do not have our freedoms. I certainly would not want the Constitution to go away by interpretation. I want to uphold the Constitution.

The CHAIRMAN. Do you believe the Constitution says what it means and it means what it says?

Mr. BRUNETTI. Yes, sir. But case by case you have to apply it, you have to make it live. The Constitution is very simple. You can read the words, but I think judges and lawyers breath life into it. They make it live for the moment and in the case and the facts of the case.

The CHAIRMAN. Some judges, including some Federal judges, have so interpreted the Constitution. You wonder if they really studied and read the Constitution as they should have and given it a very different interpretation, evidently, from what the forefathers had in mind when they wrote it. If we just follow the Constitution we would not be in the trouble we are today with so many things.

For instance, the Constitution provides for two levels of government, the Federal level and the State level. Yet the Congress has gone into almost every conceivable facet of people's lives and that is one reason we have such a big deficit that we have today. I will not take the time to go into all that, but I just wish the Constitution was taught more in our schools and colleges and I wish even the lawyers would read it more often because it seems to me that most of it is pretty clear. People ought to be able to understand it. But when judges give it a peculiar connotation, it is very difficult to reconcile it with what the words of the Constitution really say.

Mr. Brunetti, I do not think I have any more questions of you. You come highly recommended, and I feel certain you will be confirmed and I wish you well on the bench and I hope you will enjoy your service on the Federal bench as a circuit judge.

Mr. BRUNETTI. I am sure I will and I respect the privilege of being here to appear before you. Thank you, Mr. Chairman.

The CHAIRMAN. You are now excused if you wish to leave.

Now, Mrs. Batchelder, would you like to introduce your family who is here with you? I believe your two children have recommended you for this position. [Laughter.]

Mrs. BATCHELDER. I want you to know, Senator, I very much appreciate the recommendation. I was not expecting that question from the Senator and I held my breath for a moment. [Laughter.]

I would like to introduce my husband, Representative William Batchelder from Ohio.

The CHAIRMAN. I understand he is a member of the legislature of Ohio.

Mrs. BATCHELDER. Yes, he is. My son Bill, my daughter Elisabeth and if I might——

The CHAIRMAN. We are glad to have you here. If you have any friends you want to introduce, please do.

Mrs. BATCHELDER. Yes, we do, Senator. Donna Pope, the Director of the Mint and a longtime friend of ours is here and her assistant, Michael Brown, and a very dear friend of ours here in Washington, Dr. Dan Heldman.

The CHAIRMAN. We are very pleased to have all of you here.

I am always glad to see a lady appointed a Federal judge, and I am glad that President Reagan is increasing that number on the bench too.

Judge Batchelder, I notice that you graduated in law from Akron University School of Law in 1971. You were a law clerk, I believe, for 12 years at Williams & Batchelder.

Mrs. BATCHELDER. I was an associate there at Williams & Batchelder.

The CHAIRMAN. An associate at Williams & Batchelder. Law clerk, 1971, an associate, 1971 to 1983. You also have been a bankruptcy judge since 1983 now.

Mrs. BATCHELDER. That is correct.

The CHAIRMAN. How did you like that work as a bankruptcy judge?

Mrs. BATCHELDER. It has been very good experience for me, Senator, and I have enjoyed it very much.

The CHAIRMAN. Are you familiar with the new bankruptcy law we passed last year?

Mrs. BATCHELDER. I certainly am.

The CHAIRMAN. Now, you have been a bankruptcy judge, I believe, since 1983. This is a trial court of special jurisdiction arising out of the Bankruptcy Code, title XI. I am confident that you are very knowledgeable on the laws pertaining to bankruptcy and related matters. I wonder if you foresee any difficulty in the transition from a code of limited jurisdiction to the Federal district court?

Mrs. BATCHELDER. No, Senator. I do not foresee any particular difficulty. I think as a matter of substantive law I will undoubtedly have a great deal to learn or perhaps relearn. I am, however, through the trial practice both in my practice and as a bankruptcy judge now for 2 years familiar with the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and I think that the necessary tools to handle the trial work I have developed so far to a pretty good degree. It is going to take, I think, to make the transition a lot of hard work and a lot of long hours, and I am looking forward to devoting that to the job.

The CHAIRMAN. Judge Batchelder, are there ever circumstances under which a judge should attempt to establish new judicial precedents and, if so, what are the criteria you use in order to determine the propriety of reversing an existing precedent?

Mrs. Batchelder. Well, I think the question of new judicial precedent, Senator, would certainly come up in an area where new law has been established and there is no precedent. That would be one situation.

If, however, your question is directed toward establishing new precedent in the face of precedent already existing, I think that those circumstances would be very limited. I believe that the role of stare decisis in our legal history is very important, I believe that the function of the trial court, particularly the Federal trial court, is to resolve disputes, not to try to be a problem solver in any general sense, and I think that at this point in time I could not foresee very many situations in which I would find myself looking to establish new precedent unless the precedent limited, for example, to my district was in my most careful consideration incorrect or, worse yet, violative of the Constitution. If I am confirmed my oath will be to uphold the Constitution.

The Chairman. Judge Batchelder, would you give us your own perspective on the recent trend in the Supreme Court toward stricter standards of standing.

Mrs. Batchelder. Yes. I am encouraged by that trend, Senator. I think that throughout the history of our constitutional law, in the earlier years particularly, standing was a very restricted concept, and I think that that was well thought out and I think the expansion of standing over the years has, for one thing, certainly contributed to the incredibly increased volume of caseload in the Federal courts, and I think that it has contributed to the increasing intervention of the Federal courts into most nearly every aspect of our society; and I believe that a restriction of the concept of standing will be very helpful.

The Chairman. ~~Judge Batche~~lder, you informed the committee that your litigation as a practicing attorney was totally civil in nature.

Mrs. Batchelder. That is correct.

The Chairman. Do you feel this lack of criminal trial experience will in any way hinder you in the performance of your duties as a Federal judge?

Mrs. Batchelder. No, Senator, I do not. I realize that is an area in which I do not have any experience, but I think when one considers the body of substantive law which faces a Federal trial judge, probably the Federal criminal law is as uncomplicated to master as any area as far as the statutes are concerned. The constitutional aspects of it are, of course, much more complex and will involve considerable study, but I have had the good fortune for the past several years to be a member of the National Conference of Bar Examiners as a drafter of constitutional law questions for the multi-State bar examination and as such I have made it a point to keep up with what is coming out of the Supreme Court in all areas of constitutional law, and I think that I will be able to master that relatively quickly. Again, it will take some hard work.

The Chairman. I have been in the Senate now 30 years and I have seen the Federal Government going into more and more fields of jurisdiction that are reserved to the States, and it has disturbed me very much. The 10th amendment provides that all powers not specifically delegated to the Union are reserved to the States. Do you believe in that principle?

Mrs. BATCHELDER. I do, indeed, Senator, and I agree with your earlier statement that that is not complicated to read or interpret.

The CHAIRMAN. I think that covers any questions that I have.

I want to again congratulate you on your appointment and wish you well on the bench. I feel certain you will have no trouble being confirmed, and I predict you will make an excellent judge.

Mrs. BATCHELDER. I thank you very much, Senator. It has been an honor to appear before you.

The CHAIRMAN. You are now excused.

Mrs. BATCHELDER. Thank you.

The CHAIRMAN. At this time I see that our distinguished colleague, Representative Bob McEwen of Ohio is in the audience. Would you like to say a few words on behalf of this nomination?

STATEMENT OF HON. BOB McEWEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. McEWEN. It is my privilege to express my support for the nomination of Judge Batchelder. Her reputation and respect in the legal community is well known, and I am honored to be able to speak on her behalf and encourage the support of the committee.

I have known the Batchelders for many years. I was privileged to serve with Representative Batchelder, the judge's husband, during our tenure in the State Legislature of Ohio, and his reputation is of the highest quality as well.

Therefore, with this background of knowledge of the dedication and commitment to the American ideals that have marked their public service, I am honored to make this recommendation to the committee.

The CHAIRMAN. Thank you, Mr. McEwen.

The committee stands adjourned.

[Whereupon, at 2:30 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

MELVIN T. BRUNETTI

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: November 10, 1933, Reno, NV.

Legal residence: Nevada.

Marital status: Married to Gail Buchannan Brunetti, 3 children.

Education: 1951-1953, 1956-1957, 1960—University of Nevada. 1960-1974, Hastings College of Law, University of California, J.D. degree.

Bar: 1964, Nevada.

Military Service: 1954-1956, Army National Guard.

Experience: 1964-1969 Vargas, Bartlett & Dixon Associate; 1970-1971, Laxalt, Bell, Berry, Allison & Lebaron Associate; 1971-1978 Laxalt, Bell, Berry & Allison, Partner; 1978—present, Allison, Brunetti, MacKenzie, Hartman, Soumbeniotis & Russell, Ltd., Member.

JUDGE ALICE M. BATCHELDER

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Birth: August 15, 1944, Wilmington, DE.

Legal residence: Ohio.

Marital status: Married to William G. Batchelder III, 2 children.

Education: 1961-1964—Ohio Wesleyan University B.A. degree. 1968-1971—Akron University School of Law, J.D. degree.

Bar: 1971—Ohio.

Experience: 1971-1983—Williams & Batchelder, Law Clerk 1971, Associate 1971-1983. 1983-present—U.S. Bankruptcy Judge, Northern District of Ohio.

Office: United States Court House, 201 Superior Avenue, Room 412, Cleveland, Ohio 44114.

Home: 435 E. Smith Road, Medina, Ohio 44256.

CONFIRMATION HEARING ON J. THOMAS GREENE

WEDNESDAY, MARCH 20, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, in room SD-430, Dirksen Senate Office Building, at 10 a.m., Hon. Strom Thurmond (committee chairman) presiding.

Also present: Senator Hatch.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met this morning to have a hearing on J. Thomas Greene of Utah, to be U.S. district judge for the District of Utah.

Senator Hatch and Senator Garn are here and we will be very pleased to hear from Senator Garn first and then our other distinguished Senator.

Senator GARN. Thank you very much, Mr. Chairman.

I know that when we have a nominee from our State that it is customary for Senators from our State to come and introduce that person. Sometimes we know them, and sometimes we do not. When we do not we usually have a long, prepared statement to indicate that we do not know them very well, and I do not have one today. And the reason I do not, I simply do not need one. I have known Tom Greene for more than 30 years and I think that speaks far more than anything that we said in some long statement about his legal background. And I do not mean to minimize that legal background, because Senator Hatch and I, in the appointment of our Federal judges in Utah, created bipartisan commissions and out of those commissions comes some fine nominees. And the commissions have been made up of distinguished citizens in our State, from law school, private sector, business, private citizens, and that selection process has been extremely thorough, totally on a nonpartisan basis. And the three commissions that we have commissioned, only one man has been recommended by all three commissions, and that is Tom Greene.

For that reason, I do not think I need to take a long time talking about his legal expertise, background and qualifications in that way to be a Federal district judge. I think those people in Utah have spoken loudly and clearly in recommending him on three different occasions to be a Federal district judge.

The main thing I want to communicate to you, Mr. Chairman, today is the fact that I think the best qualification to hold public office, to be a judge, or any other office, is a matter of integrity, honesty and character, and having known Tom and his family for more than 30 years, I can testify to that personally. We have never had a finer nominee to be Federal district judge, not only in Utah, but in any place in this country when we use those standards as a test.

I do not know when I have ever had the opportunity to testify on behalf of a fellow Utahian that I felt more strongly that a correct decision has been made, and the President of the United States could not have made a better choice. It is not just Tom. It is his family. I think one of the most highly important things is, and Tom may not agree, but his wife and I were born in the same town in Utah, a town of not more than 5,000 people. So Tom showed fine judgment in the selection of his wife as well. That may not have much to do with being a Federal district judge, but I think it certainly has a great deal to do with being a good Federal judge, if you have a fine supporting wife and family, and Tom does that as well.

I could just not be more pleased to be here and support the nomination of Tom Greene to be a Federal district judge from the State of Utah.

The CHAIRMAN. Thank you very much, Senator.

We are very pleased to have your endorsement. Are you going to stay or leave now?

Senator GARN. I am going to stay for a few minutes, Mr. Chairman, before I go to appropriations and play with MX this morning.

The CHAIRMAN. We would be very pleased to hear from Senator Hatch, who is a member of this committee, chairman of the Constitution Subcommittee, and we are very pleased to have him.

Senator HATCH. Thank you, Mr. Chairman. It is with a great deal of pleasure and pride that I appear here this morning to introduce Tom Greene to the Judiciary Committee. I want to personally thank you, Mr. Chairman, for accommodating Senator Garn and myself, by having this hearing at the earliest possible time and for having it this morning so we can both work on some serious State business this afternoon.

I also feel the same as Jake does about Tom Greene. I have known him for a long time. I am telling you he is a lawyer's lawyer. He is an individual who has practiced law with exemplary conduct. He is a person of high integrity. He is a person of high ethics. He is the president of his law firm, and he is recognized throughout the State as one of our best trial lawyers in the State of Utah.

He is also recognized as one who has given a lot to the community as well as to the practice of law.

In addition to serving in positions of responsibaility in the local, State, and national bar associations, Tom has been active in numerous other activities. For example, he is currently serving as a member of the Utah Board of Regents; a member of the National Committee of American Inns of Court; a member of the Committee on Rules of Civil and Appellate Procedure established by the Utah

Supreme Court; chairman of the State building authority; and director of the Utah Chapter of American Judicature Society.

The challenge of serving at this time as a judge in the District of Utah demands the unique skills Tom brings to this appointment. In the Utah District Court, the number of cases filed has increased from 647 annually in 1977 to 1,489 annually in 1982—a 130-percent increase in 5 years. No district in the 10th circuit and only three other districts in the entire Nation experienced a sharper climb in the rate of filings over that period. In light of these demands, Congress provided in Public Law 98-353 for another judgeship in Utah to ensure that our judicial resources would be sufficient to perform the lofty mission created by article III of the Constitution. It is gratifying to know that an individual of Tom's stature is willing and ready to accept and meet the challenges presented by the growing caseload of a growing State.

Tom has had a distinguished legal career. He graduated summa cum laude from the University of Utah in 1952 with a bachelor's degree in political science. He then attended the University of Utah Law School where he was the note editor of the Law Review, won the moot court championship, graduated near the top of his class, and was awarded the Order of the Coif.

During the 1954 term, he served as a clerk for one of our justices on the Utah Supreme Court, Allen Crockett. With his educational credentials being of the highest order, he began his practice as a member of the Utah Bar.

During 30 years, he has worked as a sole practitioner, member of a small firm. He has worked as an assistant U.S. attorney and managing partner of one of Utah's most prestigious law firms, and of course as the senior partner of that firm.

His wide experience in both civil and criminal litigation has won the respect of the Utah Bar. And as you read the investigative file, you find that there is virtually no criticism of Tom Greene. He has been consistently called a lawyer's lawyer throughout our investigation. In fact, Tom was also elected president of the Utah State Bar for the term of 1970-71.

I could go on and on, but I would just say in closing that I think this is one of the best district court nominees that I have seen in the hundreds of nominations that you and I personally have viewed as members of the Judiciary Committee.

I think Tom will make one of the most outstanding district court judges in the country. I am looking forward to see the great work he will do on the bench and I know it will benefit Utah and our country. And as an upholder of the Constitution for everybody in our country, I could not recommend any human being any more highly than I recommend Tom Greene.

Mr. Chairman, you have met his family, and you saw what kind of people they are.

He will lend dignity to the bench and prestige to the practice of law in the State of Utah, and throughout the country.

I am happy to fully recommend to this committee our own Thomas Greene for this position as Federal district court judge.

The CHAIRMAN. Thank you very much.

I want to congratulate you upon being nominated as a Federal district court judge by President Reagan, who I think is one of our greatest Presidents. I want to congratulate you for having the high endorsement of both of your Senators. Utah has two of the ablest and most dedicated Senators in the Senate.

Senator Garn is chairman of the Banking Committee and prominent in other activities. He is an astronaut too.

Senator Hatch is a member of this committee, chairman of the Constitution Subcommittee, high up in rank here. He is also chairman of the Labor, Education, and Welfare Committee. And so you have an endorsement of the best men in this Senate. And for that I am sure you are grateful.

Now, I am going to swear you in. Before I do that, if you care to introduce your family with you in public, please feel free to do that, and any friends you have here.

Mr. GREENE. May I do that. Thank you, Senator.

I want to indicate my deep appreciation to Senator Hatch and Senator Garn for their marvelous statements about me, and I appreciate them very much.

My wife, Kay and my daughter, Mary Kay; my son John, are all here and I wanted to introduce them to you, Chairman Thurmond.

The CHAIRMAN. We are very pleased to have you here.

Mr. GREENE. My son, Tom, is in San Francisco with a new job, and he was unable to come, but he is here in spirit.

The CHAIRMAN. Thank you very much.

If you will stand up and be sworn.

Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. GREENE. I do.

The CHAIRMAN. Senator Hatch, since you are a member of this committee, would you care to come around and preside at this hearing. I have another appointment any way, and I appreciate your doing it.

Senator HATCH [presiding]. Mr. Greene, will you make any statement that you care to make at this particular point and then we will have some questions for you.

TESTIMONY OF J. THOMAS GREENE, NOMINEE

Mr. GREENE. Thank you, Senator. I just want to say that I have practiced law for 30 years. I enjoyed it and it has been a love affair, really, with the principles of law. I have had a lot of opportunity to get involved in the administration of justice through the judiciary committees, through bar work, pro bono work. I have a desire to continue that quest for improving the administration of justice and look forward to serve as a judge.

I will certainly do my best, if the Senate chooses to confirm me.

Senator HATCH. Thank you so much. We are going to keep the record open throughout the day for any questions that any other members of this committee would like to submit to you.

Senator Thurmond has submitted a number of questions in writing and we would like to have them answered before the end of the day, if you will. And any other questions that any other members of the committee have.

Perhaps we could start off by asking you to tell the committee about your personal background, where you were born, where you were raised.

Mr. **Greene**. Thank you.

I was born and raised in Salt Lake City, UT. I have lived there all my life, practiced law, as I said, for 30 years. I have had experience as a special assistant attorney general for the State of Utah in railroading and the interstate commerce-type matters.

I have been counsel for the grand jury in Salt Lake County and assistant U.S. attorney. But most of my practice has been in private civil-type work in the commercial law area and in litigation in general.

Senator **Hatch**. How old are you now?

Mr. **Greene**. I am 55 years old.

Senator **Hatch**. Are you in good health?

Mr. **Greene**. Yes.

Senator **Hatch**. These jobs really require a great deal of effort, and judges have to be in good health.

Where did you go to school?

Mr. **Greene**. I went to school in the Salt Lake City system in East High School and at the University of Utah, both undergraduate and law school.

Senator **Hatch**. Now, as I understand it, you have lived in Utah your whole life.

Mr. **Greene**. With the exception of 2 years when I was a missionary in New England, that is true.

Senator **Hatch**. How long have you actually practiced law?

Mr. **Greene**. Thirty years and one month.

Senator **Hatch**. Can you tell us a little bit about the different firms and associations you have had as an attorney. Just give us that for the record.

Mr. **Greene**. Well, the first two years of my practice, I was a sole practitioner in an office-sharing arrangement. In those days there was no criminal public defender system, so I wanted trial practice and I asked the judges in Salt Lake City to appoint me in criminal cases, and that is where I got a lot of trial experience, about 100 felony cases in the first couple of years. I got a bouquet of roses once as a fee, but I did not receive much money. I got a lot of good experience.

From there I went into the U.S. attorney's office for a couple of years. Then, as a partner in what was Marr, Wilkins & Cannon, a long time existing law firm, and I was there continuously until that firm changed its name to Cannon, Greene & Nebeker and some other intermediate names, but from 1959 to 1974 I practiced law in that law firm. And I was a partner in the beginning but I went through a lot of stages and growth in litigation and departmentalization of the firm.

When we merged in 1974 with the firm of Callister, Kesler & Callister, creating Greene, Callister & Nebeker, which has been the firm for the past 11 years.

Senator **Hatch**. Are you managing partner of the firm.

Mr. **Greene**. I am the senior partner and chairman of the board. I was president. I am not the managing partner. I am more of a litigator.

Senator HATCH. Now, tell us about your bar association activities, both State, local and national.

Mr. GREENE. Well, I have been very active in bar work since the days of the junior bar when I was chairman of the young lawyers' section in Utah. And then I was bar commissioner of the governing body of the integrated Utah Bar for 6 years, president of the State bar in the early 1970's. I have been chairman of the judiciary committee, chairman of the committee on law and poverty. I have been very interested in providing legal services to the poor for many years. And I am now chairman of the Utah State Bar Committee on Professional Rules of Conduct.

In the American bar I have had a long involvement as a member of the council of the national resources section.

I have been involved in natural resources law for some years. I was a member of that council for 3 years and the council of general practice for 6 years. I was chairman of the Special Committee on Environmental Law of the American Bar Association. We conducted hearings on industrial siting across the country and did a report on development and the environment. And for the last 6 years I have been a delegate to the house of delegates of the American Bar Association.

Senator HATCH. Could you describe some of your other civic and professional activities in which you have been involved which you think may be significant here for our committee?

Mr. GREENE. Yes. I have been involved in educational matters. Right now I am a member of the Utah State Board of Regents and have been for a couple of years. I was a member of the Alumni Board of the University of Utah, president of the community services council, where I had an opportunity to address the needs of the Greater Salt Lake area.

I have been involved in quite a lot of other activities in the community.

My wife has been very active also in that respect. Some people think I am overmarried, especially those from Texas.

Senator HATCH. You have described your wide legal experience. Could you just describe the nature of your legal practice presently.

Mr. GREENE. Yes. I had been general counsel for several cooperatives, the two largest farmer cooperatives in the State, for some years. And I do agricultural cooperative law, but my main thrust has been in banking law as counsel for a major bank in Utah, Zions First National Bank. I have been involved in railroad law and natural resources law with major clients in Utah, and general litigation has been a major thrust of my legal involvement.

Senator HATCH. Are you aware of any potential conflicts of interest that might come up on the bench?

Mr. GREENE. Well, in 30 years of practice I feel sure there will be some situations where clients whom I have represented will come before me. I know that will be a conflict. I know of no per se conflicts of interest.

Senator HATCH. Well, if such conflicts arise, how would you handle them?

Mr. GREENE. Well, I certainly will recuse myself if it appears there is any conflict of any significance. Sometimes conflicts are more apparent than real, and a hearing may be held to determine if there is a conflict.

Senator HATCH. Some people are concerned about judicial restraint versus judicial activism. Would you tell us what those terms mean to you and how you feel you would approach your duties on the bench with regard to either of those terms.

Mr. GREENE. Well, I am not positive what everyone means by those terms. They signify to me, in the case of judicial activism, of going beyond the bounds of the case before you, and trying to impose orders that might be broader than the case or controversy that is before the court. Judicial restraint would be more in the nature of exercising strict construction over matters, constitutional matters, and others. My notion on it is that a trial, particularly a trial judge, ought to seek and find the law and apply it to the case at hand and not attempt to go beyond the four corners of the case or to impose broad social legislative-type orders.

Senator HATCH. Let me ask that question maybe in a little more detail.

In your mind what is the proper role of stare decisis in constitutional law? What would you consider your duty to be in a case in your court if precedent conflicted with the Constitution as you believe it should not be construed?

Mr. GREENE. Well, the doctrine of stare decisis would have to be followed if it really applied to the case at hand. I would want to be sure, after hearing all the facts and analyzing the precedent, that it really is on point. But I think a trial judge is obliged to follow precedent, particularly in his circuit, particularly under the Supreme Court of the United States. I think a particular problem would arise if the judge was confronted with a true belief that the principle of the law initiated by the circuit were itself unconstitutional, and I feel I would point that out. But I would be duty bound to follow the precedent if it really applied.

Senator HATCH. Let me be more specific on judicial restraint and what your concept is. Would there be a time for a judge to read into a statute or the Constitution a meaning not intended by its authors?

Mr. GREENE. Well, it does not seem to be appropriate to try to apply something that was not the intent of Congress. I would want to find out what the meaning of the statute was, what the intent of Congress was behind the legislation by whatever means that would be available. I do not think it is appropriate to insert other nonlegislative intent purposes.

Senator HATCH. Let me ask Senator Thurmond's questions so you can put them orally into the record, and you will not have to make written responses to them today.

Mr. Greene, Senator Thurmond considers, and I do also, judicial temperament to be a prerequisite for a Federal judge. Could you please give us your thoughts on that particular subject.

Mr. GREENE. Well, I certainly agree with Senator Thurmond that it is a prerequisite. A judicial temperament, I believe, should embrace such illusive qualities as patience and courtesy and decisiveness and I would hope to inculcate those virtues as part of my temperament on the bench.

Senator HATCH. One of the characteristics of judicial activism is to impose broad affirmative duties upon governments and society. Would you give me your thoughts on this subject.

Mr. GREENE. Well, I agree that that is what the effect of judicial activism would be. I do not believe imposing such affirmative broad orders on society is the proper role of the judge. I think the role of the judge in trial setting is to listen to the evidence, apply the facts to the law and decide the case and controversy before him. That is what I would endeavor to do.

Senator HATCH. Along that same line Senator Thurmond would ask you this question:

We frequently hear the argument that courts act in response to various social problems because a legislature has failed to act on its own. Mr. Greene, how would you respond to this defense of an activist judiciary?

Mr. GREENE. The duty of the court is to find and determine the law, and the law might be found in precedents or by analogy or legislation. And it should not be created by the court. That is how I respond to that. I think of the case I had on the Great Salt Lake where there was no law as to the question of what to do about the salt going from one part of the lake to the other and salt company just had a license which was not an exclusive license, and the analogy was to treat the exportation of salt like one would if he were fishing for fish. It is not yours until you catch it. That was not really creating law, but it was the judicial rule that I think was appropriate in that case.

Senator HATCH. Now, you and I both know that Utah's district court is facing an enormous workload. It has grown by leaps and bounds, as I described in my remarks earlier. What ideas do you have for managing this enormous burden that we have in the court out there?

Mr. GREENE. Well, I think hard work is going to be required, but I do have some thoughts about discovery abuse and how interrogatories, which are machine created, stamped out, be restricted by a court. But a court ought to have more active management over cases to move them along. I think that might have a salutary effect on a caseload, finding out if a case might settle before the courthouse steps rather than letting the thing drag on for months.

Senator HATCH. Now, with respect to interpreting the Constitution, what importance are the intentions of the framers concerning our rights and privileges, in making the correct application of constitutional principles?

Mr. GREENE. I think the intention of the framers is of the utmost importance. Certainly the intention of the framers ought to be taken into account and sought after in any constitutional interpretation.

Senator HATCH. Some in Congress believe that the use of the death penalty is a very controversial issue in our society today. Do you believe that there are cases in which the death penalty is an appropriate sentence? And what considerations would be most important to you in deciding whether or not to utilize the death sentence?

Mr. GREENE. Well, first of all, on that and all other social issues, I have tried not to express publicly a point of view. I do not want to go down as having made a prejudgment on anything before I saw all the facts and law. I would not want to be in a situation where I would be challenged for having taken a prejudgment position, but I do believe that in the case of the death penalty where the proper safeguards have been enunciated that there are appropriate times, and I would certainly follow whatever the law of the land is with respect to the matter. I think it must be judiciously and very carefully applied.

Senator HATCH. In the crime package that we passed this last year, we provided for a sentencing commission. Do you see any difficulty with such a commission as a Federal district court judge?

Mr. GREENE. I do not know what that legislation says. I understand the concept of the sentencing commission and the desire to arrive at determinant sentences. The problem of the disparity among the courts in sentencing, I believe, exists. But I believe that there should also be some discretion based upon the particular facts of the case where a judge can listen to all of the facts and circumstances in connection with sentencing. So I could have some problems with it, depending on how it exists and would be applied.

Senator HATCH. As you know, Utah has had somewhat of a checkered past with regard to the exercise of power of U.S. district judges on the bench.

Mr. GREENE. I have heard rumors about that.

Senator HATCH. I think you saw that as much as I did.

Mr. GREENE. I lived through that.

Senator HATCH. I had in mind Judge Ritter. There were many who did not like him and feel that he exercised power without proper restraint. So, naturally, I think we are all very concerned about getting people on the bench who will not try the cases for the attorneys. And knowing you and knowing how many times you have had to try cases, and knowing how many times you have had to put up with judges interjecting themselves improperly, or maybe in an officious manner, I would like to suggest to you that I hope you will remember your experience as a litigator and let the attorneys try their own cases. I would like to see us have total fairness in our courtrooms in Utah.

Mr. GREENE. I agree with the ideal of fairness and equity in all cases.

Senator HATCH. Is there anything else you would like to go into the record at this point that would be helpful to the committee?

Mr. GREENE. Well, I filled out an extensive questionnaire that is very searching and I would want that to be a part of the record. But I do not have anything in mind other than the fact that I am deeply committed to the concept of equal protection of the law and equal justice under the law regardless of race, religion, sex, creed. I would expect to evenhandedly apply the law in cases that would be before me and would work to that end.

Senator HATCH. I failed to state that you are recognized by your peers and by me as having excellent writing skills, something that many lawyers aspire to but some do not ever achieve. You already have tremendous ability to put your legal thoughts on paper. I think you will be an excellent district judge. So I commend you for that.

Finally, let me tell you how this process works. We will have a markup tomorrow, assuming we get a quorum. We hope we can report your nomination out tomorrow. Any Senator on the Judiciary Committee has a right to have all the new items on the calendar moved over for 1 week. If a Senator exercises his right to do that, then your nomination would be put over to the next week's meeting of the Judiciary Committee. At that point, we hope you can be moved out of the committee, and there will be a 3-day wait where you will be placed on the executive calendar and probably a 3-day wait before your name would be brought up on the floor. And I would hope within the next couple of weeks, we can get you working in Utah as soon as possible.

Second, we have already had another judicial selection committee that has recommended five nominees for the vacancy created by Judge Anderson's move to senior status. We are moving forward on that as fast as we can. The White House has to make its selection, and their nominee will have to go through the same type of FBI investigation you went through. And whoever that nominee will be will come through the same committee process, so we hope within the next few months we can have four Federal district judges in Utah, which will be a tremendous thing for our State and will alleviate some of the tremendous backlog.

Let me ask you this question:

Assuming we can move you out of the committee and through the floor within the next couple of weeks, how soon thereafter would you be willing to be sworn in as a district court judge?

Mr. GREENE. I am in a position to do that directly. I would need a matter of days to finalize the transition of my law practice, which is being reorganized.

Senator HATCH. So you could move relatively quickly into this position on the bench.

Mr. GREENE. Yes.

Senator HATCH. Well, let me say this to you, Tom. We are very proud of you and proud that this nomination has gone through so well. I read the complete Justice Department file and every person interviewed spoke very, very highly of you. And I think that is a great tribute to you. Usually you have some people who can find some fault and I think it was a complete and exhaustive investigation. So I am proud of you, proud of your nomination and we look forward to having you serve the rest of your life as a Federal district court judge. I want to compliment you for the wonderful family you have and thank you for having them here today.

Mr. GREENE. Thank you, Senator Hatch. I deeply appreciate your remarks and your support in this matter.

Senator HATCH. With that, we will recess this committee.

[Whereupon, at 10:45 a.m., the committee recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHY

J. THOMAS GREENE

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF UTAH

Birth: November 28, 1929, Salt Lake City, UT.

Legal residence: Utah.

Marital status: Married to Dorothy Buchanan Greene, 3 children.

Education: 1949-1951—University of Utah, 1952-1953—B.A. degree. 1953-1955—University of Utah, College of Law, J.D. degree.

Bar: 1955, Utah.

Experience: 1954-1955—Law Clerk, Justice J. Allan Crockett, Supreme Court of Utah. 1955-1956—Private practice. 1956-1957—Marr, Wilkins & Cannon, Associate. 1957-1959—Assistant U. S. Attorney, U.S. Attorney's Office, District of Utah. 1959-1974—Cannon, Greene & Nebeker (formerly, Marr, Wilkins & Cannon), Partner. 1974-present—Greene, Callister & Nebeker, President (1974-1979), Chairman of the Board.

CONFIRMATION HEARING ON: CAROL LOS MANSMANN, CAROLYN R. DIMMICK, MARK L. WOLF, AND MARIANNE MELE HALL

WEDNESDAY, MARCH 20, 1985

U.S. SENATE,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (committee chairman) presiding.

Also present: Senator Mathias.

Staff present: Duke Short, chief investigator; Frank Klonoski and Joe Kopka, investigators; and Ruth Lucas, investigative clerk.

OPENING STATEMENT OF CHAIRMAN STORM THURMOND

The CHAIRMAN. The meeting will come to order.

We have met today to hold hearings on certain judges. We have one circuit judge and two district judges.

I see the distinguished Senator from Pennsylvania here, whom all the ladies think is about the handsomest Senator. We are glad to have him with us.

And, Senator Heinz, I know how busy you are, so you go ahead now.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, I want to thank you very much, and I am extremely pleased to have the opportunity to introduce a constituent to you today, Judge Carol Los Mansmann, the nominee of the President of the United States for the U.S. Court of Appeals for the Third Circuit.

Mr. Chairman, perhaps you are aware this is the second appearance before this committee for Judge Mansmann. In March 1982, it was my privilege to introduce her and endorse her nomination for the U.S. District Court for the Western District of Pennsylvania. It is especially gratifying to me that Judge Mansmann, who won her earlier appointment through merit, not politics, has been nominated by the President for the elevation to the third circuit. The third circuit has a long and proud history of judicial service to our Nation. Carol, in my judgment, will continue in that tradition of excellence.

I am delighted, Mr. Chairman, and pleased to lend my unqualified support for her nomination. I might add, it is a matter of special importance to my State and the Nation that Judge Mansmann's nomination goes forward and adds to the growing number of women to the Federal appellate bench. Indeed, Judge Mansmann will be only the second woman to serve on the third circuit court. Nevertheless, the symbolic importance of this nomination should not be allowed to obscure Judge Mansmann's credentials and temperament. She was the first female assistant district attorney for Allegheny County, my home county in Pennsylvania. She was one of the youngest attorneys to argue and win landmark trial work as a special deputy attorney general for Pennsylvania, and in private practice earned the highest marks and the enduring respect of her peers.

I suppose, Mr. Chairman, I could go on and recite numerous first and special accomplishments by Carol Mansmann. But in the interest of time, I will offer just one more thought regarding her qualifications.

First and foremost, Judge Mansmann is distinguished by her exceptional level of legal scholarship and rare facility for applying abstract legal opinions to real life situations. I have no reservation, Mr. Chairman, about Judge Mansmann's knowledge of the law. It is outstanding. Her legal opinions are a matter of record. Her experience as a prosecutor, as a law professor, as an attorney in private practice and as a Federal judge constitute the very best sort of preparation for the elevated responsibilities for which she has been nominated. She has, indeed, every qualification necessary to do an outstanding job as a member of the third circuit.

I might sum up by saying that Judge Mansmann has served the cause of justice with dignity and distinction in her professional life, and she has served her family and community as a private citizen with equal commitment and compassion.

So, Mr. President and Mr. Chairman, I am here to endorse proudly and wholeheartedly endorse President Reagan's nomination of Judge Mansmann and I urge the committee to act expeditiously on her confirmation to the third circuit.

The **CHAIRMAN**. Thank you very much, Senator.

I understand that Senator Specter has also approved her. Is he coming to testify now?

Senator **HEINZ**. Senator Specter does plan to be here.

The **CHAIRMAN**. I want to congratulate you, Judge Mansmann, for being promoted to the third circuit court of appeals. And I also want to congratulate you upon having the endorsement of the two fine Senators. They are both knowledgeable and respected men here.

Senator Spector is here now.

Senator **HEINZ**. Mr. Chairman, Judge Mansmann is accompanied by members of her family. I was wondering if she might introduce them?

The **CHAIRMAN**. We would be glad to have her introduce them.

Judge **MANSMANN**. Thank you.

I am joined by my husband, Jerry Mansmann, who is an attorney in private practice in Pittsburgh, and our four children, our sons Michael and Patrick, and daughters Casey and Megan.

You can see I am married to an Irishman who got his way in the selection of names for our children.

The CHAIRMAN. They are all fine looking children. They are generally better looking when they favor the mother, are they not?

Judge MANSMANN. Thank you.

The CHAIRMAN. Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

I join my colleague Senator Heinz in the presentation of Judge Carol Los Mansmann to the Committee on the Judiciary, which I am confident will find her exceptionally well qualified. She appeared before this committee and was approved for the U.S. District Court for the Western District of Pennsylvania. She has established an outstanding record in her work.

Of course, Judge Mansmann has a very well-rounded background, having clerked for a trial court judge, having served as an assistant district attorney, having worked as a special assistant attorney general at the State level, having been a law professor at Duquesne University, and having served as a judge on the Federal District Court.

Her family is the most compelling evidence of her understanding of so many more aspects of judging than what is learned in the case law and the statutes or even the practice of law. And it is a tribute to the President that he has watched closely the work of Judge Mansmann on the district court and has rewarded her with an appointment to the court of appeals. I think it is very important as a nation and as an administration and as a party to reward women who are of outstanding caliber.

Judge Mansmann has it all going for her, so I am very pleased to lend my word of support, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. We are pleased to have that high endorsement by you.

You are a member of this committee, so feel free to come around, if you care to, and sit with us.

The distinguished Senator from Kentucky is here.

Senator SPECTER. Senator Thurmond, I would like to be excused because I am hosting a luncheon today.

The CHAIRMAN. We are glad to have you.

Senator MCCONNELL. Mr. Chairman, I wanted to drop by and commend the people appearing today for their nominations by the President.

I suppose that anybody that Senator Specter and Senator Heinz are for, I am sure going to be for.

So congratulations on your nomination.

Judge MANSMANN. Thank you.

The CHAIRMAN. These Senators and House Members are so busy. If you will step aside, I will take the Members of Congress and call you back.

Next on the agenda is Judge Carolyn R. Dimmick of Washington to be U.S. District Judge for the Western District of Washington. I see the two Senators here from Washington State. We would be very pleased to hear from them.

Senator Gorton, you are the senior Senator. We will hear from you first.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, Senator McConnell, it is a true privilege for Senator Evans and for me to introduce Carolyn Dimmick to you and ask for your prompt recommendation of confirmation of her appointment to the U.S. District Court for the Western District of Washington.

It would be hard for us to have found a person for this position with even an equal résumé, much less a superior one. It is a matter of great pride to us to have picked her and secured her acceptance and to have seen the wide acceptance in our State bar judicial selection committee of this appointment.

Mrs. Dimmick began her legal career as an assistant attorney general in Washington State. And before, I hasten to add, I was attorney general. She then moved to the prosecuting attorney's office in King County, which is the largest county in the State, where she gained criminal law experience. She has had several years of private practice and two decades on the bench, first at the district court level in King County, then as a superior court judge, and 4 years as the first woman on the supreme court in the State of Washington.

In the State of Washington, Mr. Chairman, those are elected positions. She was required to run for office for each of them. Last September in her last election, she won by an absolutely overwhelming majority of the votes cast for that position on the State supreme court. As a consequence, she comes to you with an outstanding background of both professional and civic and family activities and will serve with distinction on the District Court bench in Seattle in the State of Washington, I am convinced, for many years to come.

The CHAIRMAN. Thank you very much, Senator.

We will be glad to hear now from Senator Evans.

STATEMENT OF HON. DANIEL J. EVANS, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator EVANS. Thank you, Mr. Chairman.

I associate myself with the remarks of my colleague from the State of Washington in feeling so privileged to have made this nomination and to see it now come to fruition. I had the unique privilege as Governor of the State of Washington to appoint Mrs. Dimmick to the superior court bench in King County about 10 years ago. That was her second judicial post. She served in that post with great distinction until her elevation to the State supreme court.

I also have the unique privilege in that my former chief of staff when I was Governor is now serving as the Chief Justice of the Washington State Supreme Court. On a number of occasions we have had an opportunity to talk about the court and its operations, and he has on several occasions told me of the invaluable contributions and the great stature Justice Dimmick gave to that court.

She now has an opportunity to help where there is a heavy caseload in western Washington. I am sure that she will in this judicial capacity serve with as great distinction as she has on each of the three previous positions.

We are delighted, both of us, to recommend her to your committee.

The CHAIRMAN. Judge Dimmick, I want to congratulate you on your appointment by President Reagan. I also want to congratulate you on having the hardy support of both Washington Senators. They are both able Senators, dedicated and doing a fine job.

I know they are busy. They can leave or remain, whichever.

Senator EVANS. Thank you.

The CHAIRMAN. Next on the agenda is Mark L. Wolf of Massachusetts, to be U.S District Judge for the District of Massachusetts.

I observed that Congressman Conte is here, and we will be very pleased to hear from him.

STATEMENT OF HON. SILVIO O. CONTE, A U.S. REPRESENTATIVE FROM THE STATE OF MASSACHUSETTS

Mr. CONTE. Mr. Chairman, members of the committee, I would first like to say what an honor and a privilege it is for me to present Mark Wolf to such a distinguished group of individuals. I know how seriously my fellow Member of Congress, senior Senator from Massachusetts Edward Kennedy, has taken his responsibilities over the years as a member of this committee. I also know the entire membership of this committee, and especially the distinguished chairman, my dear friend Strom Thurmond, have taken deeply the constitutional responsibilities which have been entrusted to it.

I want to thank you for allowing me to present Mark Wolf to the committee. When Mark told me he was being considered for a bench position with the Federal district court in Massachusetts, I immediately pledged him my full support. A few months later, after having watched his candidacy evolve to the point where it is now, I can tell you, Mr. Chairman, that I am more convinced than ever that Mark Wolf is the man for the job. I know that the committee has plenty of biographical information on Mark. Therefore, I would like to take these few moments to provide a character reference of the man you are considering for a Federal district court judgeship in Massachusetts.

I must preface these comments by telling you that Mark Wolf is a good man. He is first a family man. This is evident today because we have with us his beautiful wife Linny, and Jonathan. Little Matthew is home and anxiously awaiting the news from today's proceedings.

From a professional point of view, Mark Wolf is one of the most hard working, dedicated lawyers I know. His reputation is one of intelligence and fairness and decency with his adversaries.

In addition to these traits, Mark has maintained a sense of idealism which makes him an attractive candidate for this Federal judgeship. Since graduating from Harvard Law School in 1971, Mark has devoted a considerable amount of time in a position of public service. His recent responsibilities include 4 years as deputy attorney general. Under his leadership, Massachusetts was the only district in the Nation to designate public corruption as the highest Federal law enforcement priority. This is an example of the healthy idealism Mark possesses and a principal reason why I feel that Mark is a very attractive candidate for the Federal bench.

I could go on all afternoon outlining for the committee reasons why Mark's nomination should be approved. Because I am here to present the nominee, I do not feel I should do that.

I would like to submit for the record, Mr. Chairman, a summary of endorsements of the nomination of Mark L. Wolf and ask the committee to vote in favor of his appointment to a bench position with the Federal district court in Massachusetts.

Thank you very much, Mr. Chairman, and members of the committee.

[Material follows:]

SUMMARY OF ENDORSEMENTS OF THE NOMINATION OF MARK L. WOLF

In October, 1984, the President nominated Mark L. Wolf to become a member of the Federal District Court for the District of Massachusetts. Mr. Wolf was renominated in March, 1985. The following is a summary of public endorsements of his candidacy.

The Massachusetts Academy of Trial Attorneys, an organization of 3500 trial lawyers, endorsed Mr. Wolf, stating that he: "possesses all of the qualifications for a United States District Court Judge and that his level of trial experience is . . . appropriate for appointment to the Federal bench. . . . We have considered that [trial] experience in light of Mr. Wolf's demonstrated intellectual capacity, his fine temperament and his fairness in dealing with adversaries. Mr. Wolf's total qualifications make him a well qualified candidate for the United States District Court, and we would urge the United States Senate to confirm him expeditously."

In an editorial, the Boston Globe stated that Mr. Wolf's "impending appointment [has] generated bipartisan support throughout the state. . . . Wolf is known as a skillful prosecutor who has successfully tried public corruption cases. . . . [He is] qualified in the broadest sense to sit on the federal bench."

The Boston Herald also endorsed Mr. Wolf's nomination, stating that he is "well qualified" and will serve both our commonwealth and the nation with distinction."

Senior United States District Court Judge Charles E. Wyzanski, Jr. wrote the Boston Globe that "Mr. Wolf is generally regarded as being an excellent nominee, likely to prove to be one of the best judges of the United States District Court at any time in its history."

Lewis H. Weinstein, Esq., a former member of the Standing Committee on the Federal Judiciary of the American Bar Association, wrote to the Massachusetts Lawyers' Weekly that "Judge Wyzanski superbly set forth the opinions that many Massachusetts lawyers share of Mr. Wolf's superior qualities as a lawyer and his extraordinary fitness to be a United States District Court Judge."

Robert W. Meserve, Esq., former President of the American Bar Association and former President of the American College of Trial Lawyers, wrote the Senate Committee on the Judiciary that "I first met [Mr. Wolf] almost a decade ago when we were each appointed by the Supreme Judicial Court of Massachusetts in connection with a disciplinary matter concerning the Chief Justice of the State Trial Court. We were successful in our endeavor, in large part because of Mr. Wolf's support in every area of the case. I found his judgment to be excellent, his industry impressive and his knowledge of the law extensive. I have kept track of his progress since that time. Over the past year I have been associated with Mr. Wolf in the work of the United States Attorney's Office in Boston. In my judgment he is extremely well qualified for the appointment and I urge your Committee to report his nomination favorably."

Copies of the foregoing letters are attached.

STATEMENT OF MICHAEL E. MONE, PRESIDENT, ON BEHALF OF THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

As trial lawyers, we have an interest and concern that judges appointed to the trial courts on all levels of the state and federal judiciary have demonstrated qualifications for judicial office. We also believe an important consideration in the appointment of a trial judge is trial experience because experience as a advocate in our adversary system prepares a judge for his role as the impartial arbitrator in our courts. We do not, however, consider extensive trial experience to be the only criteria for the appointment of a judge.

Because of concern expressed by Board members regarding certain press reports of Attorney Mark Wolf's trial experience, the Massachusetts Academy of Trial Attorneys has examined Attorney Wolf's qualifications as they relate to trial experience for appointment to the United States District Court for Massachusetts. In our examination of Mr. Wolf's experience, we have had the benefit of calling upon members of the Board who have dealt directly with Mr. Wolf in an adversarial role during his tenure as Deputy Assistant United States Attorney. Our Board members who have had personal experience with Mr. Wolf are unanimous in their opinion that he possesses all of the qualifications for a United States District Court Judge and that his level of trial experience although limited is adequate and appropriate for appointment to the Federal bench.

A consideration of his trial experience could not be the only criteria in our review; and we have considered that experience in light of Mr. Wolf's demonstrated intellectual capacity, his fine temperment and his fairness in dealing with adversaries. Mr. Wolf's total qualifications make him a well qualified candidate for the United States District Court, and we would urge the United States Senate to confirm him expeditiously.

We would prefer that the process by which any appointment to either the state or federal court is considered to be more open to comment by the Bar, and we regret that the trial bar was not called upon earlier in the nomination process to comment on candidates for the two vacancies on the federal court. Although we would prefer that the process be more open, we cannot quarrel with the candidates that the present process has produced, but would hope that in the future all segments of the Bar including trial lawyers be involved in the selection process.

[From the Boston Globe, Sept. 21, 1984]

LETTERS TO THE EDITOR

QUALIFIED FOR U.S. JUDGESHIP

On September 13 the Globe published a letter from Harvey A. Silverglate purporting to summarize professional opinion as to the possible nomination of Mark L. Wolf as a United States District judge.

So far as I have determined from conversations with judges and representative members of the bar. Mr. Wolf is generally regarded as being an excellent nominee likely to prove to be one of the best judges of the United States District Court at any time in its history.

CHARLES E. WYZANSKI, Jr.
Senior District Judge, U.S. District Court, Boston.

WOLF "EXTRAORDINARY FIT" FOR FEDERAL BENCH

To the Editor: The vendetta by Harvey A. Silverglate against Mark L. Wolf apparently blinds Mr. Silverglate to Mr. Wolf's high competence and qualifications for the Federal bench, articulated very effectively by United States Senior District Judge Charles E. Wyzanski, Jr. in his recent letter to the Boston Globe.

Judge Wyzanski superbly set forth the opinions that many Massachusetts lawyers share of Mr. Wolf's superior qualities as a lawyer and his extroadinary fitness to be a United States District Judge.

Based on my own personal experience with Mr. Wolf as a lawyer, I hope that the Standing Committee on the Federal Judiciary of the American Bar Association (of which I was, several decades ago, a member) will recommend Mr. Wolf's nomination and confirmation.

It's about time that Mr. Silverglate stopped crying "Wolf."

LEWIS H. WEINSTEIN,
Boston.

The CHAIRMAN. Thank you very much, Congressman Conte.

I want to tell Mr. Wolf that he could not be endorsed by a finer man than Congressman Conte.

Mr. WOLF. I understand that.

Thank you, Senator.

The CHAIRMAN. I have known him for a number of years. He is an able Congressman and looks after his constituents.

I congratulate you on your appointment.

Senator McConnell.

Senator MCCONNELL. Mr. Chairman, if I may, I served at the Justice Department at the same time Mark Wolfe was a special assistant to the deputy attorney general. And I guess in a sense, I reported to him indirectly or directly as a deputy assistant in the Office of Legislative Affairs. I have not kept up with Mark, I must confess, in the intervening 8 or 9 years, but I am excited you have been appointed to this position, Mark. It is great to see you again.

Mr. WOLF. Thank you, Senator. It is very good to see you here.

The CHAIRMAN. Thank you very much, Congressman Conte.

Senator Kerry of Massachusetts is here. Senator, we will be glad to hear from you.

STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Thank you very much, Mr. Chairman.

It is my honor to be able to second the strong support of the Congressman from Massachusetts. In Mr. Wolf, we have a very distinguished nominee for the Federal court.

I personally served as a prosecutor in Massachusetts, running one of the largest district attorney's offices in the State. And I can say to you from my experience in law enforcement within the Commonwealth and as a private practitioner, that the court on which Mr. Wolf has been nominated to sit is a court which is really in need of his talents and that our State is waiting for those talents to be brought to what is one of the busiest courts in the Nation.

Mr. Wolf has had a strong background in public service and demonstrated a lifetime of preparation for this appointment. He is a graduate of Yale University, of Harvard Law School. He practiced law privately in this city for a period of time and then became involved at a critical moment in this country's consideration of it justice system after the Justice Department itself has become involved in Watergate.

In that post-Watergate era, the Attorney General entrusted him with some of the most important efforts the Justice Department made to restore people's faith in the system by developing policies to ensure the fair administration of justice from the taint of politics.

Mr. Wolf became deeply involved in establishing those internal guidelines in the Justice Department in the process, strengthening out serious problems within the Criminal Division itself. He also helped carve out standards of practice with respect to the Drug Enforcement Administration, which were very important at that time.

Subsequently, after private practice, again with a Boston law firm, he performed a most important service in the U.S. attorney's office where he headed up the public corruption unit. In that capacity, I know personally of the impact he has had on our State. Out of, I think, 48 public corruption cases he brought, 47 were tried successfully and prosecuted successfully.

And he also handled one of the most difficult and complex cases which we had in recent Commonwealth history in which the court itself became embroiled in a major controversy. He was chosen by an attorney who was a former president of the American Bar Association to assist, and did a distinguished job.

So I am honored, Mr. Chairman, to appear before this committee to introduce him to you and to say that, we in the Commonwealth, believe that he is someone who will carry on in the finest traditions in the Federal court system and, most importantly, in our courts in Massachusetts.

The CHAIRMAN. Thank you very much, Senator. We are pleased to have you come before the committee.

I want to tell Mr. Wolf that I am very pleased that you have been endorsed by both of your Senators. Nice of Senator Kerry to come here in person and speak for you.

Senator, I know how busy you are. You can stay with us if you want to.

Senator KERRY. Thank you, Mr. Chairman. I appreciate your courtesy.

The CHAIRMAN. Incidentally, I see a picture taken at the Political Union in 1967 when I spoke there, and Mr. Mark Wolf was in this picture at the time—years ago.

Now we will take Judge Mansmann. If you will all come around, all you judges, all three of you, if you will stand, I can swear you at one time.

[Whereupon, the three nominees, Carol Los Mansmann, Carolyn R. Dimmick, and Mark L. Wolf were duly sworn by the chairman.]

TESTIMONY OF JUDGE CAROL LOS MANSMANN, NOMINEE

The CHAIRMAN. You have already introduced your family, I believe.

Judge MANSMANN. Yes, I have, Senator.

My law clerks have come down, and they are Anne Goodwin, my senior law clerk; and Patty Gorham.

The CHAIRMAN. We are glad to have you both with us.

Judge Mansmann, it is good to see you again. I believe we confirmed you here in 1982, did we not?

Judge MANSMANN. That is correct.

The CHAIRMAN. You presently serve as U.S. district court judge for the western district of Pennsylvania, and you have been in that position since 1982.

Do you foresee any difficulty in the transition from the district court, which is a trial court, to the circuit court of appeals, which is an appellant court?

Judge MANSMANN. Senator, I do not see any difficulty whatsoever. Three years ago I made the transformation from law professor to district court judge. The experience I have had as a law professor, researching, writing, and editing, served me well on the district court bench.

What I have found in being a trial judge, a tremendous amount of work goes into cases behind the scenes——

The CHAIRMAN. Excuse me, Senator Mathias has come in. He is a member of this committee.

Judge MANSMANN. And I found a great deal of work is done in chambers. I think that experience in the research and writing and editing of opinions will serve me well as I go forward on to the court of appeals.

The work is very similar in that regard, and I think the experience I have had will serve me in that respect.

The CHAIRMAN. Judge Mansmann, do you believe that it would have been beneficial to you in your present position as a district court judge to have a sentencing commission to establish uniformity in sentencing?

Judge MANSMANN. I have had the duty of sentencing, I would say, probably 75, 80 people so far in my 3 years on the bench. I think any kind of input a trial judge gets about the person, about the crime itself and what other judges or councils and commissions deem appropriate sentences would be helpful.

I think oftentimes trial judges feel like they are on a raft at sea in sentencing. It is a decision that oftentimes changes a person's life and has a great impact on that person. I think anything that assists the trial judge in sentencing would help in showing us what would be appropriate under the circumstances. I think it would be of great assistance to the trial judge.

The CHAIRMAN. In the sentencing provision in the omnibus crime bill passed last year—one person is given 2 years, another given the same, another judge gives them 20 years—so it sets limits more or less. If a judge goes below or beyond the limits, they have to explain why they did it.

Judge MANSMANN. I think an explanation all the time is extremely important why you are sentencing someone, not only for the person but, obviously, for the public and the victim and families of the victim.

The CHAIRMAN. Judge Mansmann, article 5 of the Constitution establishes the procedures by which the Constitution is to be amended or altered. Do you believe that article 5 specifies the only means by which the Constitution should be amended?

Judge MANSMANN. Well, I think our Founding Fathers made it very clear with respect not only to changing the Constitution but a very important democratic concept, and that is separation of powers.

Judges in their roles interpret the law, but they do not make the law and trial judges do not make the law. That is left specifically for members of the legislatures, whether it is the Congress or State legislatures. And as a trial judge, I think it is extremely important to be able to rely upon the intent of Congress in passing a law and to rely upon the Constitution and its meaning and not to be attempting to change the Constitution in some other way. I think the

Constitution has lasted and has been as vital as it has been because judges as well as Congressmen and others have taken the role that has been given to them by the Constitution and have stayed within the limits of that role.

And I think it is important that the trial judge and the appellant judge stay within that role and not attempt to change the Constitution. That is left to article 5.

The **Chairman**. Judge Mansmann, the phrase "judicial activisism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does "judicial activism" mean to you?

Judge **Mansmann**. Well, it is often used in a derogatory sense to imply judges go well beyond either the letter or the spirit of the law or the Constitution itself. And I think it is, as I have mentioned, extremely important for judges who are interpreting laws to look to the intent of Congress. If they cannot ascertain that with respect to a particular fact situation or a problem in front of them, then we always go to the congressional hearings and we attempt to find out what Congress—how they would have applied the law to the particular circumstances in front of us.

I think the judicial activism ought to cover in a very positive sense those judges who work extremely hard at interpreting the law within the confines of the statutes themselves and are committed to upholding the laws of the United States and are committed to government under the Constitution. So I think while it has been said in the past to have a very negative aspect for those judges who attempt to create new laws or to create new statutes or interpret it well beyond its meaning, I would like to look at it in a positive sense and think for judges who are hard working and believe in the Constitution and the laws and upholding them that judicial activism should have a positive meaning as well.

The **Chairman**. Senator Mathias, do you have questions?

Senator **Mathias**. One question.

First of all, let me offer my congratulations.

Judge **Mansmann**. Thank you, Senator.

Senator **Mathias**. You might look at the other side of the coin of judicial activism which might be described as congressional inactivism. One of the classic examples in my experience was the failure of the Congress to redistrict congressional districts. Enormous disparities existed in various parts of the country. In the State of Maryland, we had some congressional districts with a population of 100,000 and some with a population of 800,000. The State legislatures failed to solve a problem and the Congress failed to solve the problem. There was legislative inactivism at both the State and Federal level.

Now, what is the proper role of the courts under those circumstances?

Judge **Mansmann**. It seems to me in those situations where there has been a failure by one branch, that that does not necessarily mean that the other branch steps into the role of a congressman or something of that nature. On the other hand, Federal judges interpret the Constitution.

Insofar as the Constitution would provide, for example, Senator, in the situation you are talking about, one-man vote situation, then it would be appropriate, it would seem to me, for a Federal judge to find that certain voters are not having the impact that they should or that their representation is not as forceful or constitutionally fulfilling as it should be.

Now, with respect to widespread redistricting, I think that is a matter that has to be handled, obviously, on a very close look on a case-by-case basis, having looked at all the possibilities and seeing whether or not a certain section of the population does not have the vote as a result of the redistricting that has been done. What I am saying is in those situations, in order to uphold the Constitution, the trial judge is forced in a sense to make rules that might impact on the present districting. But to do so, you have to go very slowly and carefully, making certain that this is not a situation where Congress has chosen not to act because Congress feels strongly that the present law is adequate.

Senator MATHIAS. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. That is the only questions we have. We congratulate you again and wish you a happy and successful service on the Circuit bench.

Judge MANSMANN. Thank you very much. It has been a very rare privilege for me to be here.

TESTIMONY OF JUDGE CAROLYN R. DIMMICK, NOMINEE

The CHAIRMAN. Our next nominee is Judge Carolyn R. Dimmick. Mrs. Dimmick, come around and have a seat. You have been sworn.

Would you like to introduce your family or friends?

Judge DIMMICK. Yes.

I have my husband Cyrus Dimmick, who is an attorney in Seattle, and my daughter Dana Dimmick.

Thank you.

The CHAIRMAN. Thank you.

Judge Dimmick, until recently you were a justice on the Washington State Supreme Court, I believe?

Judge DIMMICK. Yes.

The CHAIRMAN. I believe that is the highest position you have held?

Judge DIMMICK. Yes, it is.

The CHAIRMAN. You have continually been promoted or climbed up to that point?

Judge DIMMICK. That is correct.

The CHAIRMAN. Now you have been appointed as a Federal district judge. I believe you served 5 years as a judge for the King County Superior Court, and prior to that you were a judge for 10 years on the King County District Court. King County Superior Court first, and prior to that on the King County District Court.

With this fine background, would you please tell the committee what you consider to be the prerequisites for a just and fair judge.

Judge DIMMICK. To be a fair judge, Senator, I think that one needs to treat everyone who comes before them, either a litigant or an attorney, with equal respect. I think a fair judge sets aside whatever personal lifetime experiences they have had and treat the issue before them as the most important issue at the moment as it is for the litigant who comes before the court.

The CHAIRMAN. Judge Dimmick, do you feel that a judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge DIMMICK. I am sorry, I did not understand the question.

The CHAIRMAN. Do you feel a judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge DIMMICK. Oh, very definitely. I think it is extremely important for complex litigation for the judge to get involved in that issue as early as possible, to call the attorneys in, set a timetable for their discovery, and even set a trial date even though it may be a year and a half in advance.

The CHAIRMAN. Judge Dimmick, what are your views of the primary purpose of the criminal justice system?

Judge DIMMICK. The primary purpose of the criminal justice system is not only punishment, but is also housekeeping, in my opinion. It seems to me victims, who I am extremely concerned with over the years, have the need to have the questions of guilt or innocence decided dispositively at the earliest possible time and to have certainty of punishment. It is really a retaliation, if you will, for the victims to know their matters are extremely important. And it is not only the defendants' rights we are concerned about but the victims' rights as well.

The CHAIRMAN. Judge Dimmick, in response to a portion of the committee questionnaire concerning judicial activisim, you stated in part:

"Societal ills are usually best addressed by the legislative branch of government which has the responsibility of making policy decisions. It is difficult for courts to ignore these problems when other branches of government, for political reasons or otherwise, fail to act. However, a disciplined judiciary again must bear in mind that all social ill cannot be cured through litigation."

Where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Judge DIMMICK. I think Senator Mathias' question to the last candidate touches the issue exactly. Redistricting was such an issue. We had the problem in the State of Washington and we felt our court, the Supreme Court, was going to have to be approached by the litigants to handle that. But the legislature did step in at the last minute and handled it to everybody's satisfaction. That would be an example.

For instance, in our State we had comparable worth before our legislature. They were acting on it and had passed a bill, yet litigants went to a Federal district court, who then said our legislature was not fast enough and took over the management of that issue. I feel that is judicial activisim.

The CHAIRMAN. Incidentally, my wife's mother and father went to school at the University of Washington. They are from Montana.

Judge DIMMICK. Oh, my mother went to school in Montana.

The CHAIRMAN. That is all the questions, I believe, for you. You are now excused.

I hope you have—oh, Senator Mathias.

Senator MATHIAS. The nominee already anticipated and answered my questions. But I do offer my congratulations.

Judge DIMMICK. Thank you, Senator Mathias.

The CHAIRMAN. You are now excused. You may leave or remain, whichever you prefer.

TESTIMONY OF MARK L. WOLF, NOMINEE

The CHAIRMAN. Mr. Wolf, I believe you are next. Do you want to introduce your family publicly and your friends who are here?

Mr. WOLF. Thank you, Senator, I would.

As Congressman Conte said, I have with me my wife Lynne and my oldest son Jonathan.

For the record, I would like to say our younger son Matthew, who is three, is here in spirit although not present in person.

I would also like to mention an old friend from our time in Washington, Angus Yates.

The CHAIRMAN. Mr. Wolf, you have served as Deputy U.S. attorney for the District of Massachusetts since 1981, I believe?

Mr. WOLF. That is right.

The CHAIRMAN. Do you believe this experience will be beneficial to you as a U.S. district court judge, and if so, how?

Mr. WOLF. Yes, Senator, I do.

In my current capacity and also as a special assistant to both the attorney general and the deputy attorney general, I was taught, and have had the occasion to try to teach others, that we have responsibility for the administration of justice and to be fair. I think having been part of the administration of justice already has sensitized me to some concerns it would be useful to bring to the bench. In addition, as a prosecutor, I know how difficult it is to enforce the Federal criminal laws, I would bring that experience with me to the bench also.

Finally, having performed in a way that others at least regard as successful, I think I have a sense of the proper way the government ought to behave in implementing its important law enforcement responsibilities. In the rare cases the government has failed to meet those responsibilities and has injured individual rights, I think I would be in a position to recognize it and assess it in the context of the reality of those responsibilities.

The CHAIRMAN. Mr. Wolf, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client.

Mr. WOLF. I think I would be very interested in seeing justice done in my court and seeing that each litigant was effectively represented, while recognizing that as a judge I am not in a position to represent any litigant.

We have had this issue arise in matters I have been involved in as a supervisor. If I had a case such as that you described, I think I would, in the presence of opposing counsel, tell the lawyer I did not think he was doing an adequate job for his client and try to explain why. If he were a member of the U.S. Attorney's Office, I would probably call his boss, tell him that and suggest somebody more skilled be put in the case to assist him.

I might do the same if a private law firm was involved. In any event, I think I would urge the attorney to get competent assistance. If it was a civil, noninjury matter, I would ask more questions myself to make sure I was adequately informed.

The CHAIRMAN. Mr. Wolf, it has been suggested that our prisons turn prisoners into more professional criminals. What in your opinion can or should be done to improve prisoner rehabilitation?

Mr. WOLF. Well, Senator, I think that is a difficult question because, based on my experience in Washington and in Boston, I think the Federal prisons, which I am familiar with, do an excellent job within the range of what can be expected.

I also agree, and I have some vivid anecdotes that many criminals learn more crime while in prison. I do not think, however, we can really expect the prisons to reform the character of many people who have developed that criminal character, notwithstanding family influences, advocational influences, religious influences. I think one of the most important things we can do in this system is try to make sure that people who have a criminal inclination understand they will be caught and punished. I think specific and general deterrence intended to alter conduct rather than character is more likely to be effective.

On the other hand, there is no doubt that if we can do a better job in educating and training people in prison so they do not have to return to a life of crime when they get out, that would be very useful.

The CHAIRMAN. I think we have got to do more along the line of prisons.

Building industries beside those prisons—that is being done in some cases now—where the prisoners can work and earn some money and lead to rehabilitation. And it seems to me that if the prisoner is performing duties, except with a hardened criminal and determined he is going to be a pest on society, that we ought to do everything we can to make him a better citizen when he comes out.

Mr. WOLF. I certainly agree with that, Senator.

The CHAIRMAN. Mr. Wolf, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. WOLF. Well, Senator, I think that in a way touches on the point that you have raised with each of the other candidates.

I believe a judge should exercise judicial restraint. Basically, he should not be assessing the wisdom of the laws that have been passed. He should not be usurping the executive functions, and should accept them if those who were supposed to perform them have illegally defaulted only as a last resort. I think that if I had a case in which an order was required because of illegal action by an element of the executive branch, I would try to explain what was wrong with what had been done before; would ask the people with the responsibility under our democratic system to perform those functions to correct the errors and their effects, but in a way they decided and not as I told them; and would require them to report to me how they intended to remedy the proven wrongs.

I think those officials would have to be virtually in contempt for me to feel that I ought to substitute myself for them. In such a case, I would restrict my administrative responsibility to the most limited extent necessary, and for the shortest time necessary, to correct the effects of the prior illegal conduct.

The CHAIRMAN. Thank you very much.

We have a letter here dated March 11, 1985, from Robert W. Meserve, strongly endorsing you for this position. Without objection, we will put a copy of that in the record.

[Letter follows:]

1107 McCormack POCH
Boston, Massachusetts 02109

March 11, 1985

Honorable Strom Thurmond, Chairman
Senate Judiciary Committee
United States Senate
Washington D.C.

Re: Mark L. Wolf

Dear Senator Thurmond:

I understand that Mark Wolf's nomination to be a United States District Court Judge for the District of Massachusetts has been resubmitted to the Senate by the President.

I have testified on several occasions before your Committee, both when I was President of the American Bar Association and since that time. I write, in the first instance, to record my enthusiastic support of Mr. Wolf's nomination.

Mr. Wolf is a graduate of Yale College and Harvard Law School. I first met him almost a decade ago when we were each appointed by the Supreme Judicial Court of Massachusetts in connection with a disciplinary matter concerning the Chief Justice of the State trial court. We were successful in our endeavor, in large part because of Mr. Wolf's support in every area of the case. I found his judgment to be excellent, his industry impressive and his knowledge of the law extensive. I have kept track of his progress since that time. Over the past year I have been associated with Mr. Wolf in the work of the United States Attorney's office in Boston. In my judgment he is extremely well qualified for the appointment and I urge your Committee to report his nomination favorably.

As I mentioned, I have testified before your Committee in times past. I would be glad to do so again in support of this nomination at any convenient time, because I think he will add a great deal to the judicial performance of this District. If witnesses are to be heard, I should like to be one. If, in view of the large number of nominees, you feel that there is no advantage to the Committee to be gained from my personal testimony, I shall understand. But in that event I should like this letter to be brought to the attention of your colleagues as evidence of my full support of Mr. Wolf's re-nomination.

Respectfully submitted,

Robert W. Meserve

SUMMARY OF ENDORSEMENTS OF THE NOMINATION OF MARK L. WOLF

In October, 1984, the President nominated Mark L. Wolf to become a member of the Federal District Court for the District of Massachusetts. Mr. Wolf was renominated in March, 1985. The following is a summary of public endorsements of his candidacy.

The Massachusetts Academy of Trial Attorneys, an organization of 3500 trial lawyers, endorsed Mr. Wolf, stating that he: "possesses all of the qualifications for a United States District Court Judge and that his level of trial experience is...appropriate for appointment to the Federal bench....We have considered that [trial] experience in light of Mr. Wolf's demonstrated intellectual capacity, his fine temperament and his fairness in dealing with adversaries. Mr. Wolf's total qualifications make him a well qualified candidate for the United States District Court, and we would urge the United States Senate to confirm him expeditously."

In an editorial, the Boston Globe stated that Mr. Wolf's "impending appointment [has] generated bipartisan support throughout the state....Wolf is known as a skillful prosecutor who has successfully tried public corruption cases....[He is] qualified in the broadest sense to sit on the federal bench."

The Boston Herald also endorsed Mr. Wolf's nomination, stating that he is "well qualified" and will serve both our commonwealth and the nation with distinction."

Senior United States District Court Judge Charles E. Wyzanski, Jr. wrote the Boston Globe that "Mr. Wolf is generally regarded as being an excellent nominee, likely to prove to be one of the best judges of the United States District Court at any time in its history."

Lewis H. Weinstein, Esq., a former member of the Standing Committee on the Federal Judiciary of the American Bar Association, wrote to the Massachusetts Lawyers' Weekly that "Judge Wyzanski superbly set forth the opinions that many Massachusetts lawyers share of Mr. Wolf's superior qualities as a lawyer and his extraordinary fitness to be a United States District Court Judge."

Robert W. Meserve, Esq., former President of the American Bar Association and former President of the American College of Trial Lawyers, wrote the Senate Committee on the Judiciary that "I first met [Mr. Wolf] almost a decade ago when we were each appointed by the Supreme Judicial Court of Massachusetts in connection with a disciplinary matter concerning the Chief Justice of the State Trial Court. We were successful in our endeavor, in large part because of Mr. Wolf's support in every area of the case. I found his judgment to be excellent, his industry impressive and his knowledge of the law extensive. I have kept track of his progress since that time. Over the past year I have been associated with Mr. Wolf in the work of the United States Attorney's Office in Boston. In my judgment he is extremely well qualified for the appointment and I urge your Committee to report his nomination favorably."

Copies of the foregoing letters are attached.

The CHAIRMAN. Senator Mathias.

Senator MATHIAS. I am advised by staff that Mr. Wolf completed all the standard questions submitted to him in written form. I think that covers my questions.

The CHAIRMAN. Mr. Wolf, I hope you enjoy your service on the bench. And you are now dismissed. You can remain or leave.

Mr. WOLF. Thank you very much, Senator.

Senator MATHIAS. Mr. Wolf, I offer my congratulations.

The CHAIRMAN. Senator Mathias, I have a Military Construction Committee hearing at 2 o'clock. I told the other Senators to go ahead until I got there. Would you mind taking the stand.

Marianne Mele Hall has been appointed to the Copyright Royalty Tribunal.

Senator Mathias, incidentally, came in good time. He is the chairman of the Patents, Copyrights, and Trademarks Subcommittee of this committee.

It is a pleasure for me at this time to turn the hearing over to him so I can meet my other appointment.

Senator Mathias, I have three questions here. If you would ask those first.

TESTIMONY OF MARIANNE MELE HALL, NOMINEE

Senator MATHIAS [presiding]. Thank you, Mr. Chairman.

The Copyright Royalty Tribunal has an important role to play in administering the 1976 Copyright Act, particularly in the field of cable television and musical recordings. This role is qrowing in importance, as a matter of fact.

The Senate Judiciary Committee must be satisfied that nominees proposed are qualified to discharge the responsibilities assigned by law to the Copyright Royalty Tribunal. Although in the recent past it has not been the custom to hold hearings on CRT nominations, I personally think that in the case of a Commissioner of the tribunal, a public hearing ought to be the rule rather than the exception. Therefore, I did make a specific request of the chairman to call a hearing on this nomination, and I am glad he agreed to do so.

I know this is relatively short notice to you, Ms. Hall, and we appreciate you making yourself available.

On behalf of the chairman, let me pose this question to you:

You joined the tribunal in July 1984 and became the chairman on December 1, 1984. Can you tell the committee what you have accomplished in that time?

Ms. HALL. Yes, sir. I will try to summarize 8 months of work in six categories. They are the following:

One, administrative files; two, accounting records; three, legal assistance; four, library and archive work; five, public image and Government interface; and six, substantive legal work.

As far as the administrative files are concerned, category 1, I have spent approximately 4 months in addition to other responsibilities, trying to centralize the files for the agency and to create an institutional memory. Heretofore there have been five commissioners, five secretaries and five sets of files. We purchased a computer. We are putting together centralized files and trying to maximize the use of our very limited staff, minimize the recordkeeping and storage problems that we are having and eliminate a lot of the duplication of effort so we can divert the activities of our limited staff to more of the professional work that we have to accomplish.

Category 2, the accounting records are also being centralized into our computer bank. There had been substantial duplication in the recordkeeping and some obvious deficiencies. We have distributed over $130 million in 7 years. And we anticipate distributing another $150 million within the next 2 years alone. This history has been complied and centralized.

We have just distributed $11.6 million in a partial distribution on 4 previous years of cable fees. In making this partial distribution, we discovered that there were some problems in the previous methodology applied in the previous partial distributions, which problems resulted in the inequitable assessment of fees and costs to particular claimant and also made it very difficult to implement partial distributions that result from subsequent appellate decisions on our determinations.

It took about 3 months to analyze thoroughly and correct some of the accounting problems that I had encountered and to centralize and formalize the procedure which will assure that in future distributions, the costs and earnings will be equitably assessed. Also, the new procedure will be such that a change on a remand from an appellant court will be able to be implemented with proper assessment of costs, fees, and earnings.

The third category is legal assistance. Upon my suggestion, the tribunal commissioned a private law firm to do a study of our procedure and our rules of evidence. We have taken that study, and have solicited comments from the claimants who come before us. We are in the process now of analyzing all of their comments for the purpose of reforming the rules of procedure and the rules of evidence under which we conduct our hearings.

We have hired a general counsel, and we are now trying to acquire legal externs on a voluntary basis to serve the needs of the tribunal.

We are hoping, in the very near future, to begin reviewing and reorganizing all of our master case files so that our archives will be better organized and will better serve the needs of the tribunal for future decisions and so we can follow our own precedents more easily.

Category 4 is library and archive work, I spent some time putting together a library and our archives, updating our law books, our current events reference materials, our hearings before Congress, our Law Review articles. I have spent considerable time reestablishing relationships with the other Government agencies such as the Copyright Office and the Federal Communications Commission so we can be put on their mailing lists and so that we can be kept up-to-date on what is happening concerning our tribunal.

The fifth category is our public image and interface. On a weekly basis, I try to visit Congressmen, Senators, Judiciary Committees, counsel, the FCC, OTA, which are doing a study on the intellectual property, and other government agencies. I have conferred with the Congressional Research Service, the Department of Justice, the Copyright Office extensively, including the general counsel's staff, and many industry personalities and competent copyright counsel who come before us, for the purposes of once again having access to information concerning us and to bring our agency up to the state of the art in understanding all that is happening in copyright.

Last, category 6 is in the substantive legal work for the tribunal. We have concluded the 1982 cable distribution proceeding. We did a partial distribution on the 1979, 1980, 1981, and 1982 cable funds.

We have interfaced with Justice on the appeals for the 1979, 1980, 1981, and 1982 cable distribution case, and the 1982 jukebox distribution case. We are represented by Justice in all appeals.

We have just commenced the 1983 cable distribution proceedings and the 1983 jukebox distribution proceeding. We are in the process of formalizing the 1985 cable inflation proceeding for the adjustment of rates as per the inflation aspects of the Copyright Act. I have begun a study on the hearings we expect on the 1985 review of the cable rates that were determined subsequent to the 1980 FCC deregulation of cable's distance signal equivalents and the syndicated exclusivity rules.

That is what I have completed in 8 months, among other things.

Senator MATHIAS. Let me ask you about the calculations of the payments that you mentioned. Was that done as a result of court order, as a result of the request of a claimant or on the initiative of the Commission?

Ms. HALL. Initially the Commission determined that they wanted to distribute more money. In determining the percentages of additional moneys we wanted to distribute, we approached the counsel and we worked together to effectively distribute more money than we had earlier anticipated. We worked out a voluntary agreement among all the claimants and published it, received comments, and then distributed an additional $11.6 million which all the parties agreed was not in controversy and therefore free to be distributed to the claimants.

Senator MATHIAS. This is a prospect you have reckoned with?

Ms. HALL. Yes, it is. There are appeals pending in the 4 years on which we made this additional distribution. However, we feel we have reserved a sufficient amount of funds to cover reversals that may occur. And we have distributed everything we deem is not necessary to protect what is on appeal.

Senator MATHIAS. What do you hope to accomplish during the rest of your term?

Ms. HALL. There are several statutory hearings that will be completed probably by January 1986. My term as chairman expires in December 1985, but I hope to complete the statutory hearings shortly thereafter.

I hope to reorganize the master case files and the public information files and complete the archives. I hope to complete the procedural review mentioned earlier and to reform our rules of procedure. And then, and most importantly, I hope to study the problem in more detail than has been done before.

I hope to study foreign tribunals, study the Law Review articles, perhaps generate our own Law Review articles, to deal with the broader copyright problems within our jurisdiction. In the second half of 1986, I hope to do an extensive study of the cable copyright problem in particular and to draw upon the experience in other countries, and try to find a better solution for this problem.

As the fund grows every year, the interests of the claimants become more intense. And with every decision that the tribunal renders, many claimants go running to Congress and all the claimants go running to the courts. That tells me that perhaps this tribunal should be looking more deeply into alternative methods in solving this very big problem which is now approaching $120 million per year for the cable and copyright industries.

With the aid of competent counsel, with the aid of the Judiciary Committees, and with the hiring of professional staff, I hope to study this problem and hope to have the whole tribunal study the problem more deeply than they have before and possibly come up with some alternative solutions.

Senator MATHIAS. Senator Thurmond asked what are your long-term goals as a Commissioner?

Ms. HALL. I think we have just about covered them in the previous question except to say that there was little congressional mandate as to the personalities to be appointed to this tribunal in the past except that the Congress felt they should be experts in copyright law.

I would like to see our whole body elevated to that level. I would like to hire more professional staff. There is no reason why this tribunal should not be in the forefront of the compulsory licensing field, not just for this country but for other countries that are looking to us for guidance on the very same problems they are experiencing as the technology advances.

I conferred last week with a scholar from China, who was interested in how we handle compulsory licensing problems. I know there are tribunals in Britain and Australia that can offer us guidance, and perhaps we can interface with them.

This body should, I believe, be in the forefront of this industry and should be a showcase of solutions for the problems that exist between copyright owners and users as the technology advances.

Senator MATHIAS. Because of the fact that the Congress was not able to act on your nomination during the 98th Congress, you received a recess appointment. So over the last several months you have had a chance to perform the role in which the President now seeks to cast you. And you have actually presided over the tribunal during your tenure, so you are familiar with all aspects of the operation.

As a result of this experience, do you still want to be a member of the tribunal?

Ms. HALL. Yes, sir, very much so.

As a law student, copyright was my first and only great love in law school. I served as the only student intern in 1977 on the general counsel's staff of the Copyright Office during the implementation of the act. It is a great pleasure and great honor to serve on this tribunal. I want to read and study absolutely everything that is on my desk, and that is a rare situation for any lawyer to be in.

I have taught copyright law, I have practiced it, I have studied it. I would greatly appreciate the opportunity to continue serving the Copyright Royalty Tribunal.

Senator **Mathias**. The General Accounting Office has recommended that the tribunal should have the authority and funding to hire a general counsel to advise it on legal matters. What is your opinion?

Ms. **Hall**. We hired one last week.

Senator **Mathias**. I think that speaks for itself.

Ms. **Hall**. We are hoping to acquire some legal externs as soon as possible to serve on a voluntary basis to support our general counsel.

Senator **Mathias**. The GAO also recommended funding for experts, for example, economists, to consult with the tribunal. What is your view of that?

Ms. **Hall**. I would love to have any additional professional help. I greatly support the hiring of an economist.

I would also consider hiring an accountant to deal with the figures. We distribute money in hundreds of millions of dollars and we work our percentages out to five numbers beyond the decimal point. Those kinds of figures require accounting help. I have done them all just recently and would love to hire an accountant or an economist with an accounting background and any other professional support that could be budgeted for to aid the tribunal in its work.

Senator **Mathias**. You mentioned the qualifications that are expected of a Commissioner. The GAO in looking at the personnel problems of the tribunal recommended a requirement that the Commissioners be knowledgeable in matters related to copyrights. I do not know that this has been strictly observed. In fact, 2 years ago, the late Commissioner Burg, sitting at this table, explained that the issues before the tribunal are very often matters of equity and fairness. She concluded that in dealing with equity and fairness, you did not have to be either a practicing lawyer or a copyright specialist.

I am wondering how you would feel about that.

Ms. **Hall**. I disagree with Commissioner Burg. I do not know that I could do this job had I not experienced both copyright and legal training and teaching of law.

Senator **Mathias**. Did you teach copyright law?

Ms. **Hall**. Yes, I have, among several other commercial law subjects.

Senator **Mathias**. Have you practiced copyright law?

Ms. **Hall**. My practice was in corporate law and occasionally copyright issues arise.

Senator **Mathias**. You were not a specialist?

Ms. **Hall**. There are very few places for specialists in copyright short of New York or Los Angeles. Since I live in Washington, no, I did not extensively practice copyright law, although I did copyright research for the Copyright Office when I was a legal intern.

I feel strongly that a Commissioner on this tribunal would greatly benefit by being a lawyer, by having the legal discipline in their background. I feel that a knowledge of copyright is very important to do the work we do. And I also think that a knowledge of communications law is extremely helpful, a knowledge which I am now acquiring and which I wish I had when I first began.

Senator **Mathias**. You mentioned earlier the fact that the tribunal is not up to strength. How urgently——

Ms. **Hall**. I am sorry?

Senator **Mathias**. You mentioned the tribunal was not up to full strength. There are, I believe, two vacancies?

Ms. **Hall**. That is correct.

Senator **Mathias**. And there in fact have been vacancies for the last 2 years. How urgent is it in your opinion that these positions be filled?

Ms. **Hall**. I do not feel that it is urgent that they should be filled. I think that two additional persons would be helpful but not necessary.

As far as the administration of the agency itself is concerned, I do not feel that two additional persons is either helpful or necessary for the reason that the organization of the tribunal, which was done at the 12th hour at the passage of the Copyright Act, does not give clear guidance as to the tribunal's mechanism for implementing either its internal policies or the results of its determinations. Consequently, a policy has arisen on the tribunal wherein the majority vote rules. The chairman has literally no power or any tie-breaking ability.

As I sit as chairman, I see a great deal of administrative work that needs to be done as well as a very heavy hearing schedule which we anticipate this coming year, I see two more Commissioners just increasing the problem of getting the majority necessary to advance the administrative changes that I feel are necessary. There have been quite a few bills proposed in the last couple of years to reduce the tribunal to three, and I agree with those bills.

So my sentiments as to whether those two vacancies need to be filled immediately or not is clearly, no.

Senator **Mathias**. In 1983 members of the tribunal appeared before the Subcommittee on Patents, Copyrights and Trademarks. There were five at the time. Only one of those five is still a member of the tribunal. So this relates to another aspect of the personnel problem.

That is a very rapid turnover. Does this have any adverse effect?

Ms. **Hall**. This is why I have spent 4 months trying to reconstruct central files for the tribunal.

That did present a problem. Because there were 5 Commissioners, and five sets of files, and it appears as if some of them took their files with them. That is why I feel as chairman one of the most important things I am doing is centralizing the office so that if we do have turnover, it is clear to new Commissioners coming on board what the history of the agency was so they can pick and immediately begin functioning.

Heretofore, I understand the training time was reported to this body as being somewhere in the order of 6 months to 1 year for a commissioner to function fully, which I think is excessive.

Senator **Mathias**. A related question, although a more personal one, related to the question of turnovers. If you are confirmed, is it your intention to serve for a full 7-year term?

Ms. **Hall**. My confirmation is for the unexpired term of Katherine Ortega, which would grant me until 1989 or only 4 years. I wish it were 7 years. I hope you will reconsider me again in 1989.

As I have stated before, this is a job that I have always wanted and would be happy to stay with indefinitely.

Senator MATHIAS. There would be no problem with turnover as far as you are concerned?

Ms. HALL. No. I am there to stay if you will give me the chance.

Senator MATHIAS. Thank you very much for coming in.

The Subcommittee on Patents, Copyrights and Trademarks expects to have a hearing within 1 month or so on the question of the enforcement of both the civil and criminal enforcement of copyright law. And at that time we plan to invite the members of the Copyright Royalty Tribunal to submit testimony. So we will look forward to hearing from you further at that time.

Ms. HALL. Thank you, sir.

Senator MATHIAS. We appreciate your being here today.

The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 2:37 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

MARIANNE MELE HALL

NOMINEE, COMMISSIONER, COPYRIGHT ROYALTY TRIBUNAL

Birth: July 8, 1950, New York, NY.

Legal residence: New Jersey.

Marital status: Divorced, One child.

Education: 1968-1971—Northeastern University, B.S. degree. 1975-1978—Rutgers School of Law, Newark, New Jersey, J.D. degree.

Experience: 1972-1975—Eastern Airlines, Special Services Agent. 1979-1980—Riggs Bank, Equal Employment Specialist. 1980-1981—NS&T Bank, Trust Business Development Officer. 1978-present—Northern Virginia Law School, Associate Professor. 1982-present—Private Practice. 1984-present—Copyright Royalty Tribunal Commissioner, Chairman.

JUDGE CAROL LOS MANSMANN

NOMINEE, U.S. CIRCUIT JUDGE, THIRD CIRCUIT

Birth: August 7, 1942, Pittsburgh, PA.

Legal residence: Pennsylvania.

Marital status: Married to J. Jerome Mansmann, 3 children.

Education: 1960-1964—Duquesne University, B.A. degree. 1964-1967—Duquesne University, School of Law, J.D. degree.

Bar: 1967—Pennsylvania.

Experience: 1967-1968—Law Clerk, Hon. Ralph H. Smith, Jr., Court of Common Pleas, Allegheny County, Pa. 1968-1972—Assistant District Attorney, Allegheny County, Pa. 1973-1974—Mansmann & Mansmann, Partner. 1974-1979—Special Assistant Attorney General, Commonwealth of Pennsylvania. 1974-1982—Law Professor, Duquesne University, School of Law. 1982-present—United States District Judge, Western Dist. of Pennsylvania.

JUDGE CAROLYN R. DIMMICK

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF WASHINGTON

Birth: October 24, 1929, Seattle, WA.

Legal residence: Washington.

Marital status: Married to Cyrus A. Dimmick, 2 children.

Education: 1947-1951—University of Washington, B.A. degree. 1951-1953—University of Washington, School of Law, LL.B. degrees.

Bar: 1953—Washington.

Experience: 1953-1954—Assistant Attorney General, Washington State Attorney General's Office. 1955-1959—Deputy Prosecuting Attorney. 1960-1962—King County Prosecuting Attorney's Office. 1959-1960, 1962-1965—Private practice. 1965-1975—Judge, King County District Court. 1976-1980—Judge, King County Superior Court. 1981-1/1985—Justice, Washington State Supreme Court.

MARK L. WOLF

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MASSACHUSETTS

Birth: November 23, 1946, Boston, MA.

Legal Residence: Massachusetts.

Marital Status: Married to Lynne Lichterman Wolf, 2 children.

Education: 1964-1968—Yale College, B.A. degree, cum laude. 1968-1971—Harvard Law School, J.D. degree, cum laude.

Bar: 1971—Massachusetts, 1972—District of Columbia.

Military Service: 1969-1975—United States Army Reserve.

Experience: 1971-1974—Surrey, Karasik & Morse, Associate. 1974-1975—Special Assistant to the Deputy Attorney General, U.S. Department of Justice. 1975-1977—Special Assistant to the Attorney General, U.S. Department of Justice. 1977-1981—Sullivan & Worcester, Associate (1977-1979), Partner (1980-1981). 1981-present—Deputy U.S. Attorney, District of Massachusetts, U.S. Department of Justice.

CONFIRMATION HEARING ON ANN C. WILLIAMS

TUESDAY, MARCH 26, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon and McConnell.

Staff present: Duke Short, chief investigator; Frank Klonoski and Joe Kopka, investigators; and Ruth Lucas, investigative clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We are meeting today to hold a hearing for a vacancy of U.S. district judge in Illinois.

Is it Miss or Mrs.?

Ms. Williams. Miss.

The Chairman. You are not married?

Ms. Williams. Oh, I am married, Mr. Chairman.

The Chairman. Ms. Ann C. Williams, of Illinois, has been appointed U.S. district judge for the Northern District of Illinois. Senator Simon is here with her.

Senator, I know how busy you are. We will take your statement first, if you would like to do that.

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator Simon. I thank you, and I have just apologized to Ms. Williams for leaving immediately. I have to run over to the floor on a matter.

I am very pleased to be here to introduce Ms. Williams, who is an alumna of the University of Notre Dame Law School. She is an assistant U.S. attorney for the Northern District of Illinois. She has worked in a variety of things, including as regional drug task force coordinator.

She has taught at Northwestern University Law School and the National Institute for Trial Advocacy. She will be, if she is approved by this committee and by the U.S. Senate, the first black woman in the Illinois Northern District Court, the first black woman President Reagan will place on the Federal bench, and very obviously, Mr. Chairman, also one of the youngest judges in the country.

On the basis of what I know about her, Mr. Chairman, I think she would make a very distinguished member of the bench for the Northern District of Illinois.

The CHAIRMAN. Thank you very much for your statement, Senator.

I believe, Ms. Williams, you have the endorsement of both of your Senators from Illinois.

Ms. WILLIAMS. That is correct, Mr. Chairman.

The CHAIRMAN. Both of these are fine gentlemen, and that goes a long way on your confirmation to have your Senators be with you.

Now, if you will stand up and be sworn, I will be glad to—Senator, you stay or leave, whatever you prefer.

Senator SIMON. I am going to have to leave. Thank you very much.

The CHAIRMAN. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. WILLIAMS. It will.

The CHAIRMAN. Would you care to introduce any family or friends you have with you?

STATEMENT OF ANN C. WILLIAMS, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

Ms. WILLIAMS. Yes, I would, Mr. Chairman. I would like to introduce my husband, David J. Stewart; my two children, Jonathan Williams Stewart, and Claire Elizabeth Williams Stewart; and my parents, Mr. and Mrs. Joshua M. Williams.

The CHAIRMAN. We are glad to have all of you with us.

Ms. Williams, you have served, I believe, as assistant U.S. attorney for the Northern District of Illinois since 1976.

Ms. WILLIAMS. That is correct, Mr. Chairman.

The CHAIRMAN. In 1983, I believe you were promoted to the newly created position of Chief and Coordinator of the Presidential Organized Crime Drug Enforcement Task Force of the northern central region.

Ms. WILLIAMS. That is right.

The CHAIRMAN. This program was designed to dismantle sophisticated narcotics organizations by using the combined resources of all the Federal law enforcement agencies, was it not?

Ms. WILLIAMS. That is right, Mr. Chairman.

The CHAIRMAN. Would you tell the committee what, in your opinion, have been the major accomplishments of the task force and what our law enforcement agencies can do to further deter drug abuse?

Ms. WILLIAMS. Well, I think there have been some substantial accomplishments of the task force. The first that we can look at is the increase in the number of continuing criminal enterprise indictments that have been returned throughout the country.

Prior to the inception of the task force, that statute was used, but not used as often or as frequently as it should have been used to attack the major narcotics traffickers of this Nation.

The number of indictments under that CCE statute has increased significantly and, of course, that is very important because there is a 10-year mandatory minimum sentence in that statute, and up to life.

The task force has also been significant because the smaller districts throughout the country are now looking at major narcotics trafficking organizations and returning substantial indictments, multidefendant indictments, to get at entire rings of narcotic traffickers.

Also, in terms of the law enforcement agencies, the various Federal agencies, along with State and local agencies, have better working relationships, share information more frequently, and I think the task force has contributed to that.

In terms of improvements, obviously the various agencies have their own competing interests, but I think over time, as they get the opportunity to work together and they see the successes of the task force, the relationships will improve even more.

The CHAIRMAN. Ms. Williams, a concept of using the combined resources of all Federal law enforcement agencies is excellent in theory. However, I wonder if, in reality, there is sufficient interaction between agencies.

The IRS, for example, has severe restrictions against disclosing taxpayer-related information even to other government agencies and, at times, has been unable to further provide criminal information obtained from the taxpayer or his records to the department exercising appropriate jurisdiction.

Ms. Williams, what has been your experience in this area, and do you have any recommendations for improving and coordinatinq our law enforcement agencies' efforts?

Ms. WILLIAMS. Mr. Chairman, I think you have properly identified the problem we have had with the Internal Revenue Service. Of course, that was a concern of the task force program from its inception because the relationship that IRS had had with other agencies had not been very good due to those problems.

Recognizing that, the Internal Revenue Service has cooperated tremendously with the other agencies and there have been some changes in the procedures so that in order to open a tax grand jury which heretofore took 4 to 6 months, the process in terms of task force cases has been speeded up to between 4 and 6 weeks.

To get taxpayer returns, a process that used to take several months in the past, we can now get those returns within 1 week to 2 weeks. Basically, what has happened is the number of levels of review at the IRS have been eliminated in order to expedite these investigations.

I would recommend that a continuing effort be made to find ways to cut down on the red tape and the levels of review so that law enforcement can get to those areas that are needed as quickly as possible.

The CHAIRMAN. If the Senate confirms you and you become a judge, would you feel free to write the Attorney General and make recommendations that you think would be helpful?

Ms. WILLIAMS. Well, if I should be confirmed by the Senate, I do not think it would be appropriate for me to make those recommendations. I feel that within the law enforcement community—the U.S. attorney's office, the various agencies—that it would be more appropriate for those agencies to make those kinds of recommendations.

The CHAIRMAN. Well, would you feel free to make them to this committee, then?

Ms. WILLIAMS. Oh, certainly, Mr. Chairman.

The CHAIRMAN. If you would feel free to write me as the chairman of the Judiciary Committee, I could transfer them.

Ms. WILLIAMS. I would certainly do that, Mr. Chairman.

The CHAIRMAN. Ms. Williams, you have had considerable experience here in the criminal field. Have you tried any cases in the civil field?

Ms. WILLIAMS. No, I have not.

The CHAIRMAN. I am just wondering if you feel that your lack of civil trial experience will in any way hinder you in the performance of your duties as a Federal judge.

Ms. WILLIAMS. I do not think so, Mr. Chairman. I have spent a considerable amount of time speaking with a number of individuals who are engaged in the civil practice and who have had criminal experience as well—primarily, former assistant U.S. attorneys.

They inform me that the process of learning civil procedure has not been a difficult one. Obviously, I will have to spend a lot of time mastering civil procedure and practice, but I feel, with the experience I have on the criminal side, that it will not take a great deal of effort for me to catch up.

Also, I should point out that with regard to my teaching experience with the National Institute for Trial Advocacy and with Northwestern and other institutions, I have had an opportunity to try civil cases and to supervise lawyers and students in the area of the civil practice.

So I have at least been exposed to the civil practice, although I have never tried a civil case. So I feel, with a lot of hard work, I will be able to come up to snuff in that area.

The CHAIRMAN. Are you willing to study those rules hard and study other civil procedures required in the Federal courts and prepare yourself well?

Ms. WILLIAMS. Oh, certainly, Mr. Chairman. As a matter of fact, at the time that I was initially nominated in October, I received a number of materials from the Judicial Center relating to the civil practice, and in these intervening months I have been reviewing all those materials.

I have been spending time in Federal court listening to civil matters and discussing with district court judges the civil practice.

The CHAIRMAN. Now, I believe they have a course for Federal judges. Are you planning to take that course?

Ms. WILLIAMS. Certainly, Mr. Chairman.

The CHAIRMAN. If you could go where some cases are being tried on the civil side, it might be helpful to you.

Ms. WILLIAMS. Yes, and, Mr. Chairman, I——

The CHAIRMAN. I was a trial judge once in the highest trial court in South Carolina. I found it very helpful to have a good notebook on the different principles that you need to charge a jury on. I think if you talk to other judges, they all have notebooks to use that are very helpful to them. I would suggest you talk to some of them and get the benefit of the experience of these judges who have been on the bench for some time.

Ms. WILLIAMS. Mr. Chairman, I certainly welcome that suggestion and I will continue to do so. I have, in the past 3 months, been doing just that, speaking to some Federal judges, and I will continue that practice.

The CHAIRMAN. Ms. Williams, in recent years Congress has given a great deal of consideration to reform of Federal habeas corpus procedures. Some of these cases now go on from the State courts and come into the Federal courts, and some in the Federal courts continue on for years.

After a sentence has been handed down in a capital case or otherwise, it takes years to bring them to an end. So we passed a Federal habeas corpus bill through the Senate, but it has not gotten through the House.

I wonder if you would give us your thoughts on this subject.

Ms. WILLIAMS. Well, I think, Mr. Chairman, that it certainly has created a problem within the judicial system because of the number of petitions that have been filed. It is my feeling, based on conversations I have had with judges and also with my experience, that we need to find a way to limit or narrow the district court's jurisdiction in those kinds of cases.

In fact, there has been a recent seventh circuit case in certain kinds of cases where the jurisdiction of the district court has been limited. And I feel that that would be appropriate in terms of dealing with the volume of habeas corpus petitions.

The CHAIRMAN. Ms. Williams, an article in the April 22, 1984, issue of the Chicago Tribune, entitled "Who Runs Chicago," states:

> The answer may be found not on the fifth floor of city hall or in the city council, but in the U.S. district court chambers, 219 South Dearborn Street, where the black-robed Federal judges preside.
>
> Meet Chicago Police Superintendent Prentice Marshall; city personnel director Nicholas Bua; Chicago Housing Authority Chief Marvin Aspen; Chicago FBI Chief Susan Getzendanner; and Milton Shadur, who wears two hats, Chicago Board of Education President and Cook County jail warden.
>
> Those are not their official titles. They are all U.S. district court judges, but they and other judges who preceded them have, for nearly 20 years, shaped the course and events of city, State and Federal governments.

Ms. Williams, would you give me your thoughts on the Federal court injecting itself so directly into the lives of the people, and tell the committee what standards you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Ms. WILLIAMS. Mr. Chairman, it is my feeling that the Federal judiciary is not the place to run institutions within the society. I very firmly believe in the separation of powers, and I feel it is the role of the legislature and also the executive to deal with those kinds of issues.

In my view, a judge should rule on the specific question presented to him or her and fashion a specific remedy to that particular problem. And I think it would be an extraordinary circumstance, or it should be an extraordinary circumstance when a judge runs, wholesale, a large institution.

The CHAIRMAN. Some Federal judges have taken over the running of school districts; they have taken over hospitals and other State institutions. It is what I would call judicial activism.

In other words, their business is to interpret the law. The Congress makes the law at the Federal level and the State legislatures at the State level. In your division of powers, your Federal Government has jurisdiction at the Federal level; the States have jurisdiction to run their own institutions.

Some of these Federal judges, because they assume their power, have taken over running these institutions and they have gone too far in many instances. How do you feel about letting the State run its own institutions?

Ms. WILLIAMS. Well, it seems to me, Mr. Chairman, that is what the State is supposed to do, run its own institutions, and that is not something that should be within the purview of the Federal Judiciary.

The CHAIRMAN. The distinguished Senator from Kentucky, Senator McConnell.

Senator McCONNELL. Thank you, Mr. Chairman. I just want to extend my congratulations to the nominee.

Ms. WILLIAMS. Thank you, Senator.

Senator McCONNELL. I enjoyed listening to your responses to the Chairman's excellent questions.

Thank you, Mr. Chairman.

The CHAIRMAN. I think that is all the questions I have. The committee will meet soon and act on these nominations, and I wish you a happy and successful tenure on the bench if you are confirmed, and I predict you will be.

Ms. WILLIAMS. Thank you, Mr. Chairman. Thank you very much.

The CHAIRMAN. We now stand adjourned.

BIOGRAPHY

ANN C. WILLIAMS

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: August 16, 1949, Detroit, MI.

Legal residence: Illinois.

Marital status: Married to David J. Stewart, 2 children.

Education: 1966-1970—Wayne State University, B.S. degree; 1971-1972—University of Michigan, M.A. degree; 1972-1975--University of Notre Dame, Law School, J.D. degree.

Bar: 1975—Illinois.

Experience: 1975-1976—Law Clerk, Hon. Robert A. Sprecher, U.S. Court of Appeals, Seventh Circuit; 1976 to present—Assistant U.S. Attorney, No. District of Illinois, Attorney (1976-1980), Deputy Chief (1980-1983), Coordinator, Drug Task Force (1983-1984) (Currently on Maternity Leave of Absence); 1979-1984—Adjunct Prof. & Lecturer, Northwestern University, Law School.

[From the Marion Daily Report, Mar. 3, 1985]

WILLIAMS APPOINTMENT TO FEDERAL BENCH DRAWS CRITICISM FROM MICHEL

WASHINGTON—Ann C. Williams is likely to become the first black female federal judge in northern Illinois despite objections from House Minority Leader Robert H. Michel.

President Reagan renominated Williams for a federal judgeship in the Northern District of Illinois Wednesday, even though Michel, R-Ill., dropped the former assistant U.S. attorney from his appointment [illegible] last month.

William, 35, is on maternity leave as director of a federal Organized Crime Drug Enforcement Task Force for the north central region.

Michel said Williams did not meet his "real high standard" for the post because she lives in the Detroit area and received a minimal rating from the Illinois Bar Association.

"I'm not about to be appointing any turkeys to the top bench," Michel said after taking over recommending judicial candidates from Sen. Charles H. Percy, R-Ill., who was defeated in November.

Williams was nominated by Percy in October, but Congress recessed before the Senate Judiciary Committee could meet to consider her candidacy.

If Williams' is confirmed when the Senate resumes in about two weeks, she will be the first black woman Reagan has put on a federal bench, the first black woman in the area and one of the youngest federal judges in the country, a Justice Department spokesman said.

THE WHITE HOUSE,
March 13, 1985.

To the Senate of the United States.

I nominate Ann C. Williams, of Illinois, to be United States District Judge for the Northern District of Illinois, vice a new position created by Public Law 98-353, approved July 10, 1984.

CONFIRMATION HEARING ON: WALTER K. STAPLETON AND CHARLES C. LOVELL

WEDNESDAY, APRIL 3, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, McConnell, and Hatch.

Staff present: Duke Short, chief investigator; Frank Klonoski, investigator; and Ruth Lucas, clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met today to hold hearings on two nominees for a U.S. circuit judge and a U.S. district judge.

Judge Walter K. Stapleton of Delaware has been appointed by the President to be a circuit court judge. Now if you will come around and have a seat. And I believe the senior Senator is here. Senator, if you will come around and we will hear from you. And Senator Biden is your other Senator, of course; he is a member of this committee. And we will be pleased to hear from him.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Thank you, Mr. Chairman.

I am going to be very brief, but it is indeed a pleasure to be here today to introduce Judge Stapleton. Judge Stapleton is an old friend of mine. He is one that has an excellent reputation both as a judge and before that as a practicing attorney.

I would just point out that he graduated with honors from Princeton, from Harvard Law School, and has his masters from the University of Virginia Law School. After that, he practiced law in Delaware, where he was a partner in the very fine law firm of Morris, Nichols, Arsht & Tunnell.

I was pleased in 1970 to have the opportunity to recommend him for the district judge. He certainly has served with great distinction and honor for the past 15 years in that capacity.

Since December 1983, he has acted as Chief Judge of the U.S. District Court of Delaware. I think one of the nicest things that can be said about him—it was said by one of the people in my office—is that, despite his long years of service as a judge, he is still the warm friendly person he always has been, and that is not true of all judges.

I also want to introduce, if I might Mr. Chairman, his wife, Trish Stapleton, and daughter, Carol.

The CHAIRMAN. We are very pleased to have his family and any friends he has with him, if he wants to introduce them.

Senator ROTH. That concludes my remarks.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, I would like to welcome Judge Stapleton and his family also, most importantly his secretary who keeps the court running; she is also here today.

Bill Roth and I agree on a number of things. We disagree on some things also. But this is one where there is a confluence of both the interest of Delaware and our opinions. And we are now going to get to share Judge Stapleton with the surrounding environs.

Judge, I want you to know though that Senator Roth made a tactical mistake when he was introducing you. He mentioned you went to Princeton and then to Harvard. And the Chairman leaned over and said, "You think we should go forward and appoint that guy?" [Laughter.]

But then he looked down and noticed you were born in Georgia and you got a masters degree at Virginia. At least you were moving south. So I think you are probably safer now than you were when your original credentials were put forward.

I would like to congratulate Senator Roth on an extremely fine appointment. Senator Roth and I have mixed emotions from our discussions, mixed emotions not about Judge Stapleton, but about the honor of being able to appoint judges. And it is something that we both take very, very seriously. Obviously, as everyone knows, that honor and privilege depends upon who is in the White House. And I think on occasion both of us wish the other team was in the White House to avoid having to make the judgment because we are not always correct.

But in this case, there can be no question, based upon your record, Judge Stapleton, and your reputation in the community not only your fine academic background and your demonstrated credentials on the bench, but you in fact are known widely as a man of great integrity. And I mean that sincerely, and I think there is no greater quality we could bring to the bench.

And I am delighted that we are going to continue what I believe has been a very, very fine tradition in Delaware. The Delaware contributions to the third circuit have been among some of the best judicial minds in the country. And I, in advance, welcome you to that club.

And one last thing, Mr. Chairman, I would like to publicly thank you. I do not know whether Judge Stapleton knows it; I know Senator Roth knows it. The only reason he is sitting there today is because of you, because when we created these new posts, I went to you and suggested that Delaware in fact warranted one of the new slots.

Admittedly, some would suggest it was a hard case to make. It is clearly a case I could not have made were it not for your willingness out of both professional courtesy to me and also to take the time to examine beyond what appeared on the record as to why we should not in fact have an extra judge; you allowed that to occur. That created a whole series of events, and although we are talking about district court there, not the circuit, it created a series of events that led to, I think, where we are today.

So indirectly, if you will, the chairman is partially responsible for the good fortune of the third circuit, and I mean it sincerely, Judge; I think you are a phenomenal appointment. I am tempted to say I could not have done better myself. Probably I could not have done as well. And I want to suggest to you that we are all served by your serving and willingness to continue to serve on the court.

We know it is a sacrifice to stay on the bench, and we are glad you are making it. And again I compliment you, Bill. It is a fine choice and I am enthusiastic, as you can tell, about this appointment, Mr. Chairman.

I thank you.

The CHAIRMAN. Thank you, Senator Biden.

I want to congratulate you, Judge Stapleton, on your appointment to the circuit bench. You are well educated; you were born in the South. So you ought to make a good judge. [Laughter.]

You have been endorsed highly here by both of your Senators, which is not always the case, especially when they are in different parties. Senator Roth, I believe, made the selection, but Senator Biden has gone along with him.

It is a high compliment to you to have both Senators not only to endorse you but to come here in person and speak for you. Senator Roth is held in high esteem here, and Senator Biden is too; he is a member of this committee, a ranking member. And the fact that you have those endorsements should ensure your confirmation.

Now I have a few questions here. I think we better swear you in first. Is Senator Baucus here?

All right. We will let him make the introduction and then the Senators may want to leave.

Senator Roth, you feel free to stay if you want to. I know how busy you are. If you wish to leave, well of course you may.

Senator BAUCUS. If you want to proceed, that is fine with me; if you want to proceed with Judge Stapleton, that is fine with us.

The CHAIRMAN. Well, I can hear your statement if you want to, or either I proceed here. Which do you prefer?

Senator BAUCUS. At your discretion, Mr. Chairman.

The CHAIRMAN. If you cannot make up your mind, then I will do it.

Senator BAUCUS. It is up to you. [Laughter.]

The CHAIRMAN. All right. We will proceed then with Judge Stapleton if you are not in a hurry.

Senator BAUCUS. That is fine.

The CHAIRMAN. Judge Stapleton, I think if you and Mr. Lovell would stand, I can swear you both in at the same time.

Will the testimony that you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Judge STAPLETON. I swear.

Judge LOVELL. I do.

The CHAIRMAN. Have a seat.

STATEMENT OF WALTER K. STAPLETON, OF DELAWARE, TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

The CHAIRMAN. Now, Judge Stapleton, you have been a U.S. district court judge for the district of Delaware since 1970, I believe.

Judge STAPLETON. Yes, sir.

The CHAIRMAN. And the chief judge of that court since 1983.

How many judges have you in Delaware?

Judge STAPLETON. We have four active seats now, thanks to this committee. As of last summer, we have four judgeships.

The CHAIRMAN. You know, the statistics did not quite warrant another judge there.

Judge STAPLETON. I am aware of that, and I am grateful to the members of this committee for their insight.

The CHAIRMAN. This is the only exception that is made in the whole United States. [Laughter.]

Judge STAPLETON. Thank you, Mr. Chairman.

The CHAIRMAN. As a district court judge, you have had to make rulings after careful consideration of the facts as presented at trial. As an appellate judge, you will be reviewing the decisions of district court judges. What criteria do you intend to use in reviewing those decisions in trial records?

Judge STAPLETON. Senator, if confirmed, I will review district court decisions to determine if there has been any error of law or if there are any factual rulings that are clearly erroneous. But a trial judge is in by far the best position to determine what the facts are. I know that from 15 years of experience. And a trial court's rulings as to what the facts are and how the parties got to where they are are in my book very, very rarely to be disturbed.

The CHAIRMAN. Judge Stapleton, you have 15 years on the bench. I know that you have witnessed a constant increase in the workloads of Federal courts. Do you have any recommendations that might stabilize this workload?

Judge STAPLETON. I can think of two suggestions. The first is alternative dispute resolution devices, like arbitration and mediation. I know this committee has been interested in supplementing the judicial process with experiments in arbitration and indeed, as chief judge last year, I attempted to qualify us as one of the pilot courts to experiment with court-annexed arbitration.

Unfortunately, there were a lot of courts who wanted to try that to alleviate their load, and there were only eight spots to go around. We did not get it this year. Hopefully, we will get it next year.

The only other suggestion I have is perhaps fewer laws to enforce might make the load a little easier. I am sympathetic with somebody who buys an automobile that has had the odometer set back, but I am not sure that he or she ought to have a remedy in a Federal district court.

Well, those are my suggestions for what they are worth.

The CHAIRMAN. Judge Stapleton, there is often a conflict between deeply felt constitutional views of a Federal judge and the constraints of judicial precedent. Would you tell the committee how you would resolve the tension between personal jurisprudence and precedent?

Judge STAPLETON. One hundred percent precedent and zero personal jurisprudence.

The CHAIRMAN. I presume if a case came up that the court had gone a certain way, if you were convinced the court was wrong that you would not hesitate to take a different position if down in your heart you felt it was the right thing to do under the Constitution.

Judge STAPLETON. Well, which court are we talking about, Senator? You mean if I thought the Supreme Court had taken an unfortunate position?

The CHAIRMAN. Well, say, the circuit court. In other words, you know, the courts reverse themselves. The Supreme Court has reversed itself here several times in the last few years. And it depends on who is on the Court and what their philosophy is and how they construe the Constitution. And so sometimes the judge is called upon to pass on a matter that down in his heart he just feels the Court has not acted properly. Ordinarily, you go by precedent, but if you feel there is a serious question and you are convinced that the Constitution is different and that it ought to be reviewed again, I presume you would not hesitate to act then?

Judge STAPLETON. Senator, the experience occasionally teaches us that we and the courts were not as wise as they thought they were when they decided earlier precedent. In those instances where he really have some accumulated experience to indicate that the prior decision was wrong, there should be some modification. But that modification should not be based on my personal view of what the best rule would be.

The CHAIRMAN. You would rather for the upper court to make that decision if it should be reviewed?

Judge STAPLETON. Yes, sir.

The CHAIRMAN. Well, that is another view. Some judges take different views.

Judge Stapleton, in response to a portion of the committee questionnaire concerning judicial action, is it nevertheless true that occasions arise when a court is called upon by congressional act or more rarely by the Constitution itself to enforce against some arm of government rights conferred upon an individual; when a breach of a right so conferred is found to have occurred, a court has the responsibility to providing a remedy.

Judge Stapleton, where in view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking? What are the criteria that you would consider in resolving whether or not a decision was a type that should be made by a judge as opposed to an elected legislative body?

Judge STAPLETON. Well, the first criteria between legislative decisionmaking and judicial decisionmaking, I think, is that the judge's job is to resolve a dispute between the parties that are before him. Frankly I have found sufficient challenge and sufficient difficulty in bearing the responsibility of resolving such disputes that I have had neither the inclination nor the desire to reach out to resolve more broad-based social issues.

I really think that courts as institutions are ill-suited to resolve those issues, partly because they are not politically accountable, and I think history has shown us that when people who are not politically accountable, attempt to impose solutions on controversial issues,they lose their ability to really be constructive at all.

Second, as a judge sitting in a case, I have to rely on the facts that the parties bring me. I do not have the benefit of the resources that you gentlemen do to attempt to resolve those social issues.

The portion of my answer, to which you refer, referred to a situation where Congress has conferred a right on somebody, and I pointed out that it does not do much good for Congress to create rights if there is no remedy in our Federal courts. It has not been my job to create rights. But when Congress has created rights, it has been my job to fashion remedies.

The point I was trying to make was that there is a responsibility to fashion a remedy, although we ought to be sensitive when we are fashioning them and where we have public officials involved who have a charter who are politically accountable, we ought to listen to them and defer to them when they can propose action which can be taken consistent with the rights of the plaintiff in these cases.

The CHAIRMAN. I think that is all the questions. Without objection, we will place in the record a letter here from Tom Watson Brown. He and his father are friends of mine. I believe he was in school and a classmate of yours at Princeton and Harvard.

Judge STAPLETON. He was indeed, sir.

The CHAIRMAN. Another letter from Byron Attridge of King & Spalding in Atlanta, who speaks highly of you. So we will place those two letters in the record.

Judge STAPLETON. Thank you, Senator.

[The letters follow:]

TOM WATSON BROWN
ATTORNEY AND COUNSELOR AT LAW
2100 PEACHTREE CENTER CAIN TOWER
229 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30303
(404) 522-8100

March 28, 1985

Honorable Strom Thurmond
Senate Judiciary Committee
SD-224
U.S. Senate
Washington, DC 20510

Dear Senator Thurmond:

I have learned with a great deal of pleasure that my friend and classmate, both at Princeton and Harvard Law School, Honorable Walter K. Stapleton of Wilmington, Delaware has been nominated by the President to fill a vacancy on the Third Circuit Court of Appeals. Walter has been a U.S. District Court Judge in Wilmington for the last 15 years and is extremely well-regarded by his peers on the bench, former law partners and clients, and all others who know him. I am happy to report his antecedents reach back to Georgia, his parents and grandparents being natives of Cuthbert, Georgia, where Walter still vacations in the summer, assuring his children of knowledge of their Southern heritage.

Judge Stapleton is a man of the highest academic standards, deepest integrity and outstanding character whom I unhesitatingly recommend to you for confirmation by the Senate Judiciary Committee.

Pop joins me in sending kindest personal regards.

Your friend,

Tom

Tom Watson Brown

TWB:fcf

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March 29, 1985

The Honorable Strom Thurmond
Senate Judiciary Committee
SD-224 United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I was very pleased to learn that my old friend, Walter Stapleton, United States Judge in Wilmington, has been nominated by the President for the Third Circuit. I have known Walter since our days in undergraduate school and know that he will be a great credit to the United States Appellate Court. His family roots are in Cuthbert, Georgia. His forebears and present relatives are distinguished lawyers in Georgia.

Walter has had a number of years experience on the trial bench and has served well. He is respected by the Bar and philosophically sound. I sincerely hope that the Senate Judiciary Committee will recognize his talents and approve his nomination.

With best wishes, I am

Respectfully yours,

Byron Attridge

Byron Attridge

The CHAIRMAN. The distinguished Senator from Delaware.

Senator BIDEN. Mr. Chairman, I will be very brief.

As we both know and everyone else should know, there has been an exhaustive background check on the judge and all the questions of potential financial conflict of interest all of our nominees go through, and we are not failing to ask questions because we are not concerned about those things but because the answers are in fact adequate on their face.

Judge, I would just like to ask you about one thing. You are now—and I was impressed with your last answer—you are now going to be reviewing the work of your colleagues that you have served with for some time. I find there is a mild distinction in attitude between those who are in the appellate courts and those who are in the front lines after some time in my experience in this committee for the last 10 years.

I wonder whether you could tell us now, mainly, so that when I ask you later to see if your views still comport with what you tell me now, and it is what is your view of the concept of the intercircuit tribunal, if you are familiar with what the Chief Justice and others are proposing, the rationale being that the Supreme Court needs some assistance to deal with the caseload problem?

Do you have any view at this moment on the wisdom and propriety of such a tribunal?

The CHAIRMAN. I might tell you just this about it in case you are not familiar.

Senator BIDEN. He is a sponsor.

The CHAIRMAN. That is right. And you are going to join on it too.

The Chief Justice has asked for this panel to resolve differences among the circuit courts. Some are going one way on matters and some another way. So it would be a great help to him, he says and the Supreme Court, if they can resolve those differences. Then people will know what the law is because the law is this in this District and that in another circuit court. So it will have a 5-year termination. In the trial period if it works, well it could be renewed or the Congress would not have to renew it.

But the load on the Court now has increased tremendously, and if we could take some of this load off of them, I think it might prevent the necessity for establishing an interim court there, altogether permanent court.

I would rather see this panel appointed and let the Chief Justice handle it that way, rather than establish a new court. I just thought I would give you that background. That is my view, and I think my friend would agree with that.

Judge STAPLETON. I am familiar with the proposal.

Senator BIDEN. We want you to have your own free opinion on it. [Laughter.]

Judge STAPLETON. I am familiar with the proposal and there is no doubt that inter-circuit conflicts are a bad thing for the judiciary and for the people who are trying to predict results when they are out there making decisions in the private sector. And the Court of Appeals for the Federal Circuit has done a wonderful job in solving that problem in its area of expertise.

I have not really done a lot of thinking about the inter-circuit idea. So I will not say more than that. But I would think that you would get more and quicker resolutions of inter-circuit conflicts with such a tribunal.

The CHAIRMAN. You would get a resolution too, would you not, because now some circuits have gone one way and some another way on the same question?

Judge STAPLETON. That is right; that is right.

The CHAIRMAN. Go ahead.

Senator BIDEN. That is fine. That is the State's rights position of a unified view nationwide.

I want to point out to you that, although I did not think of asking these questions to point out what I am about to say, I wish I had been wise enough to. If we ever wondered whether or not you had the judicious temperament to handle the job, the way in which you have answered the questions today indicates to me that you are well suited to be on the bench.

I have no further questions.

Judge STAPLETON. Thank you, Senator.

Senator BIDEN. Thank you very much.

The CHAIRMAN. Thank you very much, Judge. We hope that you can be—Senator McConnell from Kentucky is here. I did not realize he was here.

Senator MCCONNELL. Mr. Chairman, I have no questions. I just wanted to commend Judge Stapleton on his nomination and it sounds like his credentials are outstanding. I look forward to supporting him.

Judge STAPLETON. Thank you, sir.

The CHAIRMAN. We hope you enjoy your service on the bench, and I think Senator Biden and I can get you through here pretty quick.

Judge STAPLETON. Thank you, sir.

The CHAIRMAN. Thank you very much.

Judge STAPLETON. Thank you, Senator.

The CHAIRMAN. Mr. Lovell, if you will come around please. Senator Baucus, will you come around. And Congressman Marlenee, if you will have seats, all of you.

I have already sworn him in.

Senator Baucus, you were an honored member of this committee and you decided to go to another committee. We miss you, but we hope you are doing well, but we welcome you back.

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you very much, Mr. Chairman.

It is with deep regret that I am not sitting with you and the Senator from Delaware and other members of the committee. I think this committee is one of the most important committees in the Congress, and certainly it is one of the most fun; that is, it is the one that has the greatest intellectual pursuit among all the committees because all difficult social and moral questions in our form of government tend to become constitutional issues, tend to become Federal, legal issues. I must tell you I miss not being a member of the committee.

Senator BIDEN. Not to mention the ideological diversity.

Senator BAUCUS. That makes it even more interesting.

Mr. Chairman, Mr. Lovell is of the same quality and has the same high integrity as a Federal judge nominee as Judge Stapleton, the previous nominee that was before your committee.

I am hard pressed to name any individual anywhere in any State who has Mr. Lovell's qualifications. The best evidence of that is, as you noted with Judge Stapleton, that Congressman Marlenee, a member of the Republican Party, and myself, a member of the Democratic Party, both have the highest praise for Chuck Lovell.

Chuck Lovell was born and raised in Montana. He went to undergraduate and graduate schools in Montana. He has joined one of the most prestigious law firms in Great Falls, MT. He has been a member of that firm for some time.

I might add, Mr. Chairman, that the chief judge of the ninth circuit, Judge Browning, is also from that same area, from Belt, MT, which is very close to Great Falls.

We are blessed, we are honored to have distinguished jurists, and Chuck Lovell is one who will serve Montana in that same tradition.

If I might, Mr. Chairman, I would like to relate to you a small anecdote which indicates the degree to which Chuck Lovell enjoys the esteem and the praise of Montanans.

The FBI several times talked to and approached the Cascade County Sheriff, Sheriff Osborne in Cascade County, MT. They approached him once and asked him questions about Chuck Lovell; went back a second time and asked him questions; went back a third time and asked the sheriff questions about Chuck Lovell. When the sheriff was approached the third time by the FBI, the sheriff asked the FBI: "Well why are you coming back to me? There must be some problem with him. What is the problem?"

Well, this was the problem, Mr. Chairman: The FBI could not find anyone who had any negative comment about Chuck Lovell. They did not believe it. So they kept coming back, trying to find something negative. They could not find anything.

And that, I think, is the best evidence I could give to you of the integrity and quality of Chuck Lovell, and we are very honored to introduce him.

The CHAIRMAN. We are glad to hear from you, Senator. We are glad to have you back.

Now that is a 5-minute rollcall. We have got to go and answer that.

Senator BIDEN. Why do we not let the Congressman make his opening statement, and we may be able to save him the time.

The CHAIRMAN. If you have got it written, we can put it in the record. Now if you do not——

Senator BIDEN. We would be delighted to come back and hear you, but you may want to move onto the House.

The CHAIRMAN. Can you do it in about 1 minute or do you want to wait until we come back?

Mr. MARLENEE. I can do it in about 1 minute, Senator.

The CHAIRMAN. All right.

STATEMENT OF HON. RON MARLENEE, A U.S. REPRESENTATIVE FROM THE STATE OF MONTANA

Mr. MARLENEE. Senators, I am pleased to be here, and I am pleased to be with Judge Lovell.

I think he is the symbol of judgment, judiciousness, discretion, discipline, and integrity. I have though a couple of things that I must bring out. I have on occasion forgiven him for a lapse of judgment, such as when he embraced Black Angus cattle instead of White Herefords that I pick.

The other thing is when he putts around on a motorboat out on the lake fettering away time and money, and he is a very human, warm, personable individual. And I am happy, most happy to be here with him. On occasion we are gratified by what we are able to help accomplish and having been able to assist Chuck Lovell in this appointment I find it is one of the high points of my career.

The people of Montana will come to appreciate, love, and respect this judge if he receives the confirmation. And he will make indeed an extremely fine judge for the people of Montana and the United States of America.

The CHAIRMAN. Well, thank you very much.

We want to congratulate you on having the endorsement here of Senator Baucus, and Senator Melcher, I believe, has also endorsed you, and your able Congressman here, and with all of those backing you like they are, I am sure that your confirmation will go through.

We are very pleased to have you here.

Do you have any questions?

STATEMENT OF CHARLES C. LOVELL, OF MONTANA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MONTANA

Senator BIDEN. In light of the time, you have answered extensively the questions I have. I have none at this moment. We are going to hopefully be able to deal with your nomination in 40 minutes or so.

The CHAIRMAN. I congratulate you on your appointment and I wish you well on the bench. We have a few questions here, and I am going to let you ask them for the record since I have another hearing.

Would you like to introduce your family, Mr. Lovell.

Mr. LOVELL. Senator, my wife was unable, due to illness, to be here and the friends who are with me are either my Senator, my Congressman, or their staffers.

I thank you for the opportunity though.

The CHAIRMAN. I thought about letting the staff ask questions, but I was just reminded that staff cannot ask questions on judicial nominations. So I will come back as soon as I can. You just make yourself at home; I have a few questions to ask you.

Senator Baucus and Congressman, of course, you may leave and thank you for coming.

[Whereupon, a short recess was taken.]

The CHAIRMAN. I have a few questions.

I believe you have been a practicing attorney since 1959.

Mr. LOVELL. Yes, sir.

The CHAIRMAN. During this time, you served approximately 3½ years as chief counsel, Office of Montana Attorney General where you were responsible for the appellate division. Is that right?

Mr. LOVELL. That is correct.

The CHAIRMAN. In that capacity you supervised the significant litigation of the State of Montana other than highway cases?

Mr. LOVELL. Yes, sir.

The CHAIRMAN. You also supervised the handling of cases for the supreme court of Montana and all Federal courts and participated in the pleading and brief writing phases of these cases?

Mr. LOVELL. Yes, sir.

The CHAIRMAN. With this background, what do you feel will be the most rewarding aspect of serving as a Federel district court judge for Montana?

Mr. LOVELL. Mr. Chairman, if confirmed, it will be a real pleasure for me to bring the experience that I have had to bear on the Federal judiciary in the district court for Montana, and to utilize the experience that I have had to try to provide good sound judicial determinations for the State of Montana.

My background also lends toward a real sensitivity in the Federal-State relationship area.

The CHAIRMAN. Now would you tell the committee what arrangements you have made to dissolve your financial interest in your law firm, particularly what time period is involved, and what arrangements have been made to compensate you for your work on pending litigation?

Mr. LOVELL. Mr. Chairman, I have an agreement with my law partners to withdraw from my law firm upon the giving of approximately 30 days' notice after confirmation. There will be a purchase of my interest in my law firm which will result in the payment to me of approximately $80,000 paid without interest over a period of 3 years in monthly payments. And I have requested my partners to consider a cash payment so that I can terminate my relationship completely.

The CHAIRMAN. Mr. Lovell, the Comprehensive Crime Control Act of 1984 provides for a sentencing commission to establish uniformity in sentencing. We felt it would be helpful. Do you believe that such a commission would be helpful to you as a district court judge?

Mr. LOVELL. I certainly do, Senator. I think that act will provide uniformity of sentencing. I think it will promote equal justice under the law. The practical effect of that bill will be to eliminate parole and yet will leave in place incentives for good behavior during the term of commitment.

I have discussed that bill with the chief probation officer of the Federal district court in Montana, who seems to be of the opinion that this will be very good in that area.

The CHAIRMAN. Now we have three branches of government. The Congress makes the law; the executive branch enforces the law; and the judicial branch interprets the law.

Now some fellow judges have been accused of making law. I just wonder how you feel about judicial activism.

Mr. LOVELL. Senator, I do not think it is good whether it comes on the right or on the left. I think that the greatness of our judiciary has come from the basic principle of stare decisis and the common law. Congress is entitled to enact the laws. It is the duty of the judiciary to allow Congress to be supreme in that field so long as the law is clear and so long as it is constitutional.

And it is the duty of the courts to interpret those laws. Obviously, Congress cannot make every law so clear and perfect that it is beyond interpretation. But the courts should interpret the laws, not make laws.

And, as a district judge, if confirmed, I would not plan on making law but rather interpreting the laws of Congress, and on following the principles of State decisions within the historical bounds that our courts have done so in the best of the Anglo-Saxon tradition.

The CHAIRMAN. Senator Biden.

Senator BIDEN. I only have one comment, Judge. When the chairman asked you what thing you would most look forward to serving on the bench, I would have thought you would have said life tenure. But you did not, and I do not hold that against you. But that is what I would look forward to most if I were a judge getting appointed to the Federal court.

I do not have any questions, Mr. Chairman. I am prepared to follow your lead on this nomination.

Mr. LOVELL. Thank you, Senator.

The CHAIRMAN. Senator Hatch, do you have any questions?

Senator HATCH. No, I do not.

The CHAIRMAN. Senator McConnell, do you have any questions?

Senator MCCONNELL. We are happy to have you here.

Mr. LOVELL. Thank you very much, Senator.

Senator MCCONNELL. No questions, Mr. Chairman, other than to congratulate the nominee.

Mr. LOVELL. Thank you very much, Senator.

The CHAIRMAN. Thank you very much.

I hope you enjoy your service on the bench.

Mr. LOVELL. Thank you so much, Mr. Chairman.

Senator BIDEN. Thank you, Judge, and good luck.

Mr. LOVELL. Thank you, Senator.

The CHAIRMAN. That completes the hearing on the nominations. We are now ready to go forward with the business meeting today.

[Whereupon, at 3:05 p.m., the committee was adjourned.]

BIOGRAPHIES

JUDGE WALTER K. STAPLETON

NOMINEE, U.S. CIRCUIT JUDGE, THIRD CIRCUIT

Birth: June 2, 1934, Cuthbert, GA.

Legal residence: Delaware.

Marital status: Married to Patricia Ames Stapleton, 3 children.

Education: 1952-56—Princeton University, A.B. degree; 1956-59—Harvard Law School, LL.B. degree; 1982-84—University of Virginia, School of Law, LL.M.

Bar: 1959—Delaware.

Experience: 1959-70—Morris, Nichols, Arsht & Tunnell; Law Clerk (1959); Associate (1959-1965); Member (1966-1970). 1963—Deputy Attorney General, State of Delaware. 1970 to present—United States District Judge, District of Delaware, Chief Judge (1983-present).

Charles C. Lovell

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MONTANA

Birth: Sept. 10, 1929, Anaconda, MT.

Legal residence: Montana.

Marital status: Married to Ariliah Carter Lovell, 4 children.

Education: 1947-49, 1950-52—University of Montana, B.S. degree. 1956-59—University of Montana, School of Law, J.D. degree.

Bar: 1959—Montana.

Military service: 1952-54—U.S. Air Force.

Experience: 1959 to present—Church, Harris, Johnson & Williams. 1969-72—Chief Counsel, Office of Montana Attorney General, Appellate Division (part-time).

CONFIRMATION HEARING ON JOSEPH H. RODRIGUEZ

WEDNESDAY, APRIL 17, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m., in room SD-226, Senate Dirksen Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simon, Metzenbaum, Specter, McConnell and Hatch.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

This is a confirmation hearing of the Honorable Joseph P. Rodriguez, of New Jersey, to be a U.S. District Judge for the District of New Jersey.

I believe I see the distinguished Senators here from New Jersey, Senator Bradley and Senator Lautenberg.

Senator Bradley, you may proceed.

STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator Bradley. Thank you very much, Mr. Chairman, for the honor of coming before the committee. Members of the Judiciary Committee, I am here today, as I was last year, to introduce an outstanding member of the bar from the State of New Jersey, Joseph Rodriguez. The President has resubmitted his name for confirmation as a Federal district court judge in the New Jersey district.

The only real difference between now and last September is that the backlog in the Federal district courts of New Jersey has grown to a staggering 5,200 cases. In 1984, there were 5,700 new cases filed in this district, which amounts to about 518 cases per judge.

Mr. Chairman, how can we seriously expect justice to be served when a district court judge has a load of more than 500 cases? There are currently three vacancies to be filled in the New Jersey district. On two of those vacancies this committee is powerless to act until the President has submitted nominations. I have written the President urging him to promptly designate nominees to fill those judgeships.

But today the Judiciary Committee will consider the nomination of Joseph Rodriguez. Mr. Rodriguez's name was twice suggested to the President by the Republican Governor of New Jersey, Thomas

Kean. And twice the nomination was considered, endorsed and sent forward by a Republican President. The nomination is endorsed by both U.S. Senators from New Jersey, and the entire State delegation in the House of Representatives.

I would like also to submit for the committee's consideration a letter supporting this nomination signed by 14 past-presidents of the New Jersey Bar Association, a letter from former Governor Richard Hughes, and an urgent editorial plea for action on the Rodriguez nomination which appeared in the New Jersey Law Journal.

[The aforementioned material follows:]

STERNS, HERBERT & WEINROTH
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
186 WEST STATE STREET
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TRENTON, NEW JERSEY 08607
[illegible]

[illegible]

[illegible]

March 29, 1985

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Russell Office Building
Washington, D.C.

Dear Mr. Chairman:

President Reagan has appointed Joseph H. Rodriguez of Cherry Hill, New Jersey, to be a Judge of the United States District Court for the District of New Jersey. I sincerely believe he will make no finer appointment to the bench, and I respectfully recommend Joe Rodriguez, confident that he will be a credit to the President, to the country, to the Senate and to the State of New Jersey.

As Governor of New Jersey 1962-1970 and Chief Justice of the New Jersey Supreme Court 1973-1979, I had particular opportunity to assess the character, work and achievements of this appointee, and they were impressive indeed. He has been President of the New Jersey State Bar Association, a law school instructor, Chairman of our State Board of Higher Education, Chairman of our State Commission of Investigation, and is now our Public Advocate, an office of Cabinet rank. He has done all things well, and is held in highest esteem by Governor Kean, the citizenry of New Jersey, our Congressional delegation, and the legal and judicial community of the State.

The office of Public Advocate is a sensitive one and very rarely a complaint is heard because its occupant does his duty, to the Constitution, to the responsibilities of his office and the interest of his constituency, - the people of New Jersey.

He will be a magnificent Judge, and history will be grateful to the Senate which confirms him, as it will be to the President who appointed him.

Respectfully,

Richard J. Hughes

Richard J. Hughes

RJH:tz
cc: Honorable Members of the Senate Judiciary Committee

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December 13, 1984

PRESS RELEASE

To the Editor

Dear Sir:

There has been a great deal of publicity about the nomination by President Reagan of Joseph Rodriguez to be a Federal District Court Judge for the Federal District of New Jersey. Unfortunately, this appointment was not confirmed by the Senate before the end of its last session. It is anticipated that President Reagan will again submit the name of Mr. Rodriguez for confirmation to the new Senate for this important judicial post. Indeed, Governor Kean and both of our Senators are urging the President to do so.

The purpose of this letter, signed by 14 past presidents of the New Jersey State Bar Association, is to lend our unqualified, ringing endorsement to this appointment.

Throughout his career, Mr. Rodriguez has been an outstanding lawyer and public servant. He has served as Chairman of the State Commission of Investigation (SCI) by appointment of Governor Cahill and is currently serving as Public Advocate by appointment of Governor Kean. He is a member of the prestigious American College of Trial Lawyers and as an outstanding trial lawyer, he has been called upon to lecture on trial advocacy by organizations both within and without the State on numerous occasions. He is a past president of the New Jersey State Bar Association and a former partner in a distinguished South Jersey law firm. His extensive trial experience, proven ability, dedicated past service to the interest of the public and impeccable credentials will add another fine jurist to our Federal Judiciary. Any effort by some local politicians to detract from this sterling record or to in any way oppose this nomination, in the judgment of the undersigned, is totally without merit.

Those of us who have added our names to this letter cover every spectrum of the practice of law and, irrespective of political philosophy or party, unanimously endorse Mr. Rodriguez for this position. We applaud the unqualified support for this nomination by Governor Kean and Senators Bradley and Lautenberg. The citizens of New Jersey will be well served by the nomination and speedy confirmation of Mr. Rodriguez.

Sincerely,

Vincent J. Apruzzese
George A. Bariscillo, Jr.
Robert K. Bell
Adrian M. Foley, Jr.
Daniel L. Golden
Joseph T. Grause
Emanuel A. Honig
John R. Kelly
Theodore J. Labrecque
George P. Moser
Joseph M. Nolan
Octavius A. Orbe
Harold J. Ruvoldt, Sr.
T. Girard Wharton,

NEW JERSEY LAW JOURNAL EDITORIAL PROCEDURE

Each editorial is submitted by one of our associate editors. The editor and a group of associate editors meet weekly as a Board of Editors to consider, modify and approve each editorial.

WE NEED THREE MORE FEDERAL JUDGES

The failure to fill three additional Federal judgeships established for the District of New Jersey by Congress over 10 months ago is affecting the work of that court. Eleven Federal judges together with an active senior judge, simply cannot continue to carry the extraordinary load of criminal and civil federal litigation, often complex in nature and of long duration, which confronts this state.

The 1984 statistics from the Administrative Office of the United States Courts proves the point that almost all federal practitioners intuitively appreciate: New Jersey Federal judges carry a much heavier case load than do their brethren in the Third Circuit and in other comparable districts throughout the country. Only by dint of prodigious effort are they able to move those cases with reasonable dispatch.

For example, in 1984 there were 5,700 new cases filed in this district, or 518 per judge. This was the highest average in the circuit, and significantly higher than the 428 cases per judge filed in the Middle District of Pennsylvania, the next highest district in this circuit (barring the Virgin Islands where there are virtually no significant or complex cases).

More significant , the weighted filings—a mathematical adjustment of filings which gives heavier count to cases known to be of more difficult and time consuming nature—averaged 582 per judge, compared with the next highest figure of 433 per judge in the Eastern District of Pennsylvania and the national average of 496. Just by way of comparison, the Southern District of New York, which most laymen and perhaps lawyers regard as the busiest district in the country, averaged only 378 new filings per judge and 422 weighted filings per judge in 1984.

Nonetheless, our Federal judges have managed to keep their collective heads above water. The median time from filing to disposition for criminal trials is 5.4 months (compared with the national average of 5.0 months), and for civil cases is only 8 months, compared to the national average of 7 months. The more significant figure, which discards those cases terminated before issue is joined, is 17 months from issue to trial for civil cases, compared with the national average of 14 months.

But our judges cannot keep it up. Pending cases have increased year by year from 3,224 in 1979 to 4,842 in 1984, and from 293 to 440 per judge in the same period. In short, they are falling further and further behind. Unless there is immediate action to fill their ranks, the administration of justice in our Federal court inevitably will deteriorate, not just because litigants will wait longer for their day in court, but because our Federal judges will be debilitated by volume and unable to give the thoughtful attention and considerable time most of their cases require. Quantity, not quality, may become the result.

Ordinarily a senator of the same political faith as the President would be the official responsible for suggesting appropriate judicial nominees to the Department of Justice and the Administration for the three vacancies which now exist. Because New Jersey has two Democratic senators, that role falls to the Governor. We applaud his steadfast adherence to his previously announced determination to recommend Joseph Rodriguez for one of those vacancies and the President's renomination of Rodriguez. However, there seems to be considerable foot dragging with respect to the other two. We discern little concerted effort to present viable, capable, responsible nominees to the President for consideration.

Meanwhile the bench, the bar and the public suffer. A full complement of active, capable Federal judges must not be a matter of pork barrel politics. The demonstrated need for more Federal judges in this state has been recognized by Congress; their selection is not a matter of juggling alternative priorities.

We urge the Governor, as leader of the Republican party in this state, to proceed to draw up a list of worthy candidates for Federal judgeship and promote them with vigor to the President for consideration and action now.

Senator **Bradley**. The committee should also take note that in a rare action the American Bar Association unanimously found Mr. Rodriguez to be "exceptionally well qualified" to be a Federal district court judge.

Why has this broad array of individuals representing different political persuasions and different philosophies on important public issues united in support of Joseph Rodriguez?

I submit to you that it is for two basic reasons. First, I believe we share the view that the essential requirements for a good judge are knowledge of the law, judicial temperament, respect for the Constitution, experience, thoroughness and fair mindedness.

You will note that these are qualities that can be found in men and women of both political parties, and even people who decline to identify with either of the major parties. These are qualities that have nothing to do with how one personally feels about such issues as abortion, school prayer, or the ERA.

The second reason I believe this nomination is supported by such a broad range of individuals is that we believe that Joseph Rodriguez superbly meets the criteria for a good judge. He has served three separate Governors of New Jersey with distinction.

In the Republican administration of William Cahill, Mr. Rodriguez chaired the State's Board of Higher Education. In the Democratic administration of Brendan Byrne, Mr. Rodriguez was tapped to chair the State Commission of Investigations. And, in the current Republican administration of Thomas Kean, Mr. Rodriguez serves as the State's Public Advocate. It is significant that all three Governors have recognized his professionalism, and have found his service exceptional.

In light of Joseph Rodriguez's unusually strong background and uncommonly broad support, one might ask why this nomination has not sailed through this committee. I assume that today's hearing will answer all questions that remain in any member's mind.

Mr. Chairman, I appreciate your cooperation in insuring that this nomination will be considered by the committee in tomorrow's executive session, at least in tomorrow's session rescheduled for next week. And I would never question the right of any Senator to inquire about matters that are of concern to him or to her. But I hope that the committee will focus its attention on matters which directly relate to a candidate's ability to perform judicial duties.

In that context, it is important to keep in mind that the job of a Federal district court judge is to determine prior judicial precedent of the Court of Appeals and of the Supreme Court. A nominee's personal opinions may be of interest, but they do not reflect the ability of the nominee to determine judicial precedent.

Finally, Mr. Chairman, I would like to reiterate a point I made last year. Mr. Rodriguez's appointment to the Federal judiciary will broaden the ability of this important judicial body to be truly representative of the entire community. I do not know how many other members of the Federal judiciary are of Hispanic descent. In New Jersey, the records show, in the latest census, that nearly 7 percent of the State is of Hispanic origin. Mr. Rodriguez's appointment will certainly be welcomed by all who would like to see the Federal judiciary more inclusive of the entire community.

Mr. Chairman, I thank you for your kindness and consideration in allowing us, Senator Lautenberg and me, to come before the committee to introduce Mr. Rodriguez.

The Chairman. We are glad to have you, Senator.

Senator Lautenberg.

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Mr. Chairman, thank you first for scheduling this hearing, and members of the committee, for permitting us to testify before you, and to come forward with our recommendation on this nomination.

I am pleased to join with Senator Bradley in presenting and recommending Mr. Joseph Rodriguez to the committee.

You have before you a skilled and experienced lawyer, a teacher of trial practice, and a dedicated public servant. He has distinguished himself as a private practitioner, as a public defender, as a government advocate. It is a sign of his colleagues' respect that he has received awards from the trial attorneys of New Jersey, honorary Doctor of Laws degrees from Seton Hall and Rutgers University and St. Peter's College, and was elected president of the State Bar Association.

As Senator Bradley noted, the ABA unanimously rated him exceptionally well qualified to sit on the Federal bench.

But, Mr. Chairman, you have before you more than a skilled lawyer. You have before you more than an experienced public official. You have before you a very decent human being. And by that I mean a sense of fairness, of compassion, essential personal qualities for a judge. But it is something that is difficult to measure, especially in a short hearing, and that is one reason that I wanted to speak about Mr. Rodriguez today.

I had met Joe Rodriguez, but I did not know him well, until he was proposed by Governor Kean, and nominated by President Reagan to the Federal bench.

I inquired of lots of people, in groups around the State, about Mr. Rodriguez. I heard them tell me that he was a decent and honorable person. He is universally respected by people who know him across the whole spectrum of New Jersey life. He has been honored by groups as diverse as the ACLU and the American Legion.

Just last week Joe Rodriguez received an award in Sussex County, NJ. It is called the Friend of Hospice Award. It is an award given by a local group to individuals who advance the quality of care and concern for the terminally ill.

Mr. Chairman, people admire Joe Rodriguez's sense of duty. They respect the job he did as chairman of the State Commission of Investigation, charged with rooting out organized crime in our State. They respect the job he does as public defender, charged with defending indigents accused of crime, and they respect the job he does as public advocate, fulfilling with sensitivity a very broad legislated mandate to pursue the public interest.

Mr. Chairman, there are some in New Jersey who disapprove of the role of the public advocate. Imagine an agency with broader powers than the FTC, an agency mandated to pursue the public interest in the courts. It is a broad mandate, but one that an incumbent, who takes the oath of office, must discharge, an oath that Joe Rodriguez has responsibly discharged, just as he discharged the oath as chairman of the State Commission of Investigation, to root out crime.

I am sure that he would bring the same sense of responsibility in discharging the duties of a Federal judge. He would bring exceptional and proven legal skills, tempered by his sense of fairness and decency that are the essential qualifications for the administration of justice.

I understand that he received, and has responded to some written questions on his personal views, and I understand that he responded appropriately, as others, like Justice O'Connor did before him, by expressing his understanding of the law and his intention to enforce the precedent that is before him.

Mr. Chairman, I again want to thank you for your commitment to move with this nomination. This morning the Attorney General was before the Appropriations Committee, and he expressed to me the President's full support for this nomination.

In sum, I recommend Mr. Rodriguez to the committee, and urge you to report him favorably and promptly to the full Senate.

Thank you, Mr. Chairman.

The **Chairman**. Thank you very much, Senator.

The distinguished Senator Hatch.

Senator **Hatch**. Thank you, Mr. Chairman.

Mr. Rodriguez, welcome to the committee. We are happy to have you here, and look forward to hearing your testimony today.

I apologize for my laryngitis.

Mr. Chairman, I would like to express my gratitude to you for scheduling this hearing, and offering members of the Judiciary Committee a full opportunity to participate in the vital constitutional function of giving consent to the President's judicial nominations.

Occasionally, as in this case, questions about a nominee may arise after, or as a result of, the Judiciary Committee hearing process, and I have always appreciated your efforts, Mr. Chairman, to help us to resolve any lingering questions.

As I am sure you agree, Mr. Chairman, scrutinizing judicial nominations is one of the Senate's most important duties. In fact, it may be the most important duty in some of the Senate work that we have to do.

The reasons for the Senate's advice and consent power are well documented. The framers of the Constitution had suffered many indignities at the hands of the King's Magistrates. Recognizing what was at stake, therefore, they would not leave the selection of Federal judges to any single individual.

In practice, this constitutional doctrine has proven remarkably wise. Under the Constitution the composition of Congress changes every 2 years, the Presidency every 4 years, but Federal judges are tenured for life. The career of a Federal judge can span the administrations of several Presidents, and numerous Congresses.

Thus, as Alexander Hamilton predicted, the advise and consent function does serve as an "excellent check."

I would hasten to add, however, that this constitutional duty is best performed in the absence of any political litmus test. It seems to me that the Constitution itself sets a standard for weighing the qualifications of a judicial nominee. Article VI requires judges to take an oath to support the document, and this is the standard I have followed, and I intend to continue to follow specifically.

Is the nominee willing to uphold the language of the Constitution? It is to satisfy myself and this constitutional standard that I undertake to question any candidate for the Federal bench.

I have to add, in this regard, although I did not draft the questions mailed to you, Mr. Rodriquez, I agreed with the substance and merit of the questions. There could have been many more legitimate questions that I would have added to the 23 posed to you by mail.

I have never used a single litmus test, or single case, or single instance to disqualify anybody from receiving my vote for service on the Federal bench. If that were the case, I would have voted against many of President Carter's appointees. As you know, he appointed nearly 40 percent of the Federal judiciary.

I joined my colleagues in asking these questions because I think it is incumbent upon members of this committee, when confronted with certain questions from people who live within your State of New Jersey, to ask those reasonable questions.

Now, I want to personally thank you for taking time to answer these questions. Although some of them may seem somewhat ideological, and I might have phrased them differently had I written them, they are still relevant. This question of right to privacy under the Constitution is an extremely volatile issue on which we have witnessed wide variances of public opinion, whether it is involved in the issue of abortion or other family affairs.

I think the questions with regard to the exclusionary rule are very relevant. We have had recent cases that are major, monumental decisions involving the exclusionary rule.

The death penalty questions concerning the *Furman* v. *Georgia* case, and the statutes passed by this body, this very committee, I think, are very relevant. Moreover, I think you have done a good job in answering all of these questions.

Another important issue covered by the 23 questions concerns collateral attacks on the defendants, or a criminal defendant's conviction. Each of these questions is important, including prayer in the public schools. Incidentally I feel that you gave an excellent answer to that particular question.

The question about local governments tuition tax credits is important and relevant to our assessment of your legal skills and judicial temperament. Second Amendment questions also are important. Had you not taken time to answer those questions, I myself would have grave misgivings about whether or not I should vote for you, and I have to admit I have let a number of people go through here without asking some of these questions.

So I commend my colleagues for having propounded them.

Now, with regard to the Equal Rights Amendment, there are monumental questions and good arguments on both sides of that issue. I know, because I have held the most exhaustive inquiry on that subject as chairman of the Constitution Subcommittee, ever held in the Congress. In fact, the Constitution Subcommittee review is the only exhaustive inquiry in 50 years of considering that issue. It comprises two volumes of print that were just put out in the last couple of months.

Another important area of inquiry into your legal approach to issues is the question on affirmative action. There is probably no single issue that divides America today as volatilely as the issue involving affirmative action and numerical racial quotas. I appreciate that you took the time to answer those questions.

The questions on school busing are vital as well. We have tremendous splits, right on this committee, with regard to questions involving remedies for racial segregation. I am very interested in what your particular viewpoints are with regard to school busing, among other things.

You also answered questions involving Federal court jurisdiction, namely, whether or not the Congress of the United States can limit the jurisdiction of the Supreme Court. The Senate has tremendous splits over that and other constitutional issues. We debate whether or not that is a remedy for judicial overreaching, whether or not that should be done, and it can be done, just how it can be done, and under what circumstances.

These are not picayune, litmus test questions. These are important questions, and I want to commend you for taking the time to answer them.

Turning to another area of inquiry, mandatory service fees, that is not some inconsequential question. The *Enmons* case, a very important Supreme Court decision, divides us today on the Labor Committee on which I serve. Needless to say, this is a very, very volatile issue. We have people sitting right here today that differ very, very widely with regard to that particular issue, and ultimately it may be the court system that decides or ultimately resolves that particular issue.

With regard to your professional experience, your business partnerships, I do not know whether you answered these questions before, but you have answered them well in these responses. Memberships and offices held in professional life, I think that is important and, of course, all memberships and offices in political parties, and so forth.

So I want to personally thank you for taking time to answer questions that I think were relevant to your qualifications as a judge.

I was a little shocked to find the excitement that occurred in this country over members of this august committee asking questions, albeit after the hearing. These were questions that arose from your fellow residents of New Jersey, or people living in your area, who will be served by you. Accordingly, we felt we had to have answers.

There are many other questions that may be or could have been asked as well. I was particularly shocked to find the excitement about that in 1985, after watching actual litmus tests being applied, not only in the Tenth Circuit Court of Appeals, when President Carter was the President, but also in every other circuit in this country during his Presidency. People who were in our circuit, among the most qualified on Earth, were disqualified for nomination because they did not agree ideologically with some of those people who were asking litmus test questions for the Carter administration.

Just to bring it home clear, even when Mr. Frey was brought here, I was anxious to give him fair treatment. Mr. Frey supported my opponent in the last election. Nevertheless I told the White House to have Mr. Frey come up to my office. I stated that I would be happy to talk to him, and that I will probably support him in spite of his support for my opponent on the basis of his excellent record down at the Justice Department.

I did not sign the letter that was sent out by other members of this committee requesting the President to reject Mr. Frey; although I respect their right to do that.

So I just want to assure you that there is not a single question that is a litmus test question for me. I do not think I would disqualify a judge for a single question; although coming from the West, if there is one, probably gun control would be the most difficult one for me to handle. I might have to vote against somebody who interpreted the second amendment in such a way as to forbid people to own and to bear their own arms. That is a very, very important question to me, and to all the people in my State, the vast majority who would agree with me on that issue.

So I do not need to take any longer, Mr. Chairman, but I want to personally thank you, Mr. Rodriguez, for taking the time, and not screaming and shouting about this, but legitimately, honorably, and effectively answering these very important questions, which now help me to feel a lot better about your candidacy for this position than I felt before.

I was even amazed at some of our colleagues criticizing the questions. Nobody said they were not going to vote for you; we just wanted the questions answered, and I am going to ask questions of other nominees from here on in. I hate to show up at every one of these hearings and ask a whole string of questions, but maybe that is what we have to do if we cannot submit written questions, which we did in the past.

I want you to know I think you are an excellent candidate for this position from what I can see, and I think that the bar association has rated you fairly and credibly. I may have some questions here today, but I just wanted to say that for the record. I also wanted to raise what I felt in particular, that those who had asked these questions had not been treated very fairly in comparison to what they were really trying to accomplish and, by the way, in comparison with what went in during the 4 years when President Carter was President.

I do not blame President Carter. I do blame those who ran the judicial selection committees and who made litmus tests to disqualify anybody that did not agree with them.

Thank you.

The CHAIRMAN. Thank you, Senator Hatch.

Senator Metzenbaum.

Senator METZENBAUM. Mr. Chairman, Senator Bradley, Senator Lautenberg. Mr. Rodriguez, I welcome you today, and congratulate you on your nomination.

The CHAIRMAN. Senator Bradley and Senator Lautenberg, feel free to stay, if you want to, but I know how busy Senators are. If you want to leave, feel free to leave, and we thank you for your appearance here at this time, and giving testimony on behalf of this candidate.

Senator **Metzenbaum**. Certainly you are supported by two of our best known and best respected Senators, and that is obviously a feather in your hat, and you are clearly qualified to be a Federal judge, and I feel I am in a position to say to you today, you will be a Federal judge. You will be confirmed.

But I think you performed an especially useful purpose, because this questionnaire that was sent to you went so far beyond the bounds of propriety that this committee has seen fit to reassess the whole issue of individual questionnaires, and the chairman has made it clear to all of us that he thinks there ought to be a questionnaire from the committee, and not a group of individual Senators sending out their own questionnaires.

Now, it has been pointed out that you have received the highest rating from the American Bar Association, unanimously exceptionally well qualified. You could not do better. You have been enthusiastically endorsed by the Republican Governor of New Jersey, by the two Senators who were just here. You have ample experience as a public advocate for the State of New Jersey.

You are one of the few minority nominations for a judicial position that this administration has submitted. I hope you will be but one of many as we go down the road.

There is no doubt in my mind that you will make an excellent judge if you are confirmed. I am frank to say, Mr. Rodriguez, that in my opinion you have been subjected to some special scrutiny in the process of the review of your nomination, by the Senate, scrutiny that raises troublesome questions about the proper role of the Senate in giving advice and consent to judicial nominees.

You were singled out to answer an extensive questionnaire, eight pages long, on a number of issues regarding your personal philosophy and policy views, as well as your position on a number of constitutional questions.

I am not opposed to Senators asking your views on issues of general constitutional law. I am opposed to asking you, in advance, how you will decide certain cases involving specific legal issues. But I have no objection to your being asked if you will decide cases consistent with the law of the land.

I have taken a look at this questionnaire, and I must say that it takes the Senate confirmation process down a road that we should not go. It becomes very specific. For example, it asks:

"In his dissent to the majority opinion of the Supreme Court in *Roe* versus *Wade*, Justice Byron R. White made the following statement: Do you agree with Justice White's statement? Why or why not?"

Next question: "In his dissent to the same *Roe* opinion, Justice William H. Rehnquist made the following statement: Do you agree or disagree with this statement? Why or why not?"

It goes on with a question regarding *Roe* v. *Wade*. It asks: "Do you agree with the Court's finding that the 'viable' fetus is not a 'person'? If so, on what basis can a valid constitutional distinction be drawn between a 'human being' and a 'person'?" And it asks a number of other questions like that.

"Do you believe that legislation ever can be held to be invalid because those who enacted it did so based on the belief that the conduct proscribed is morally wrong, or that an activity or institution encouraged or helped by the legislation is morally right?"

It goes on. "What difference to the administration's case, if any, does it make whether such moral beliefs are based on a belief in the existence of a supreme being?"

That flies right in the face of the constititional prohibition upon such inquiries. No less a conservative columnist than James Kilpatrick indicated he did not think the questionnaire idea was bad, but found even that portion of the questionnaire very personally offensive.

It goes on with questions about the death penalty and habeas corpus and collateral attacks and criminal convictions, and the exclusionary rule, and prayer in the public schools, and tuition tax credit.

It asks that you give your present personal position with regards to the equal rights amendment. I say to you, Mr. Rodriguez, that I hope whatever your position is on the equal rights amendment, it has nothing to do with your qualifications to be an able jurist.

The questionnaire also asks, do you believe that *Brown* against the *Board of Education* was correctly decided? What are you supposed to be, a super judge, to come along now, and judge the actions of the Supreme Court? That is what the Senators would ask you, and I gathered you answered these questions.

I do not know how you did. I am not sure how I would have answered them. I think I would have considered it an impertinence, and would have said that my view is that I will follow the law of the land, that I may have my personal views, but when it comes to adjudicating decisions, I will follow that which is the law of the land, either enacted by the Congress or as previously determined by the Supreme Court of the United States.

The questionnaire goes on: "Do you believe that *Swann* against *Charlotte-Mecklenburg Board of Education* was decided correctly?" What kind of a question is that to ask a judicial nominee?

I say, to my colleagues, you may think it is appropriate to ask this kind of question, but this Senator finds them to be very offensive, and very indefensible, as well.

What is the purpose in asking whether a belief in a supreme being affects the constitutionality of legislation?

What difference does it make whether someone personally supports or opposes the equal rights amendment or capital punishment?

What is supposed to be the right answer about abortion, school prayer and gun control? My answer? Your answer? Somebody else's answer?

When Justice O'Connor was before us for confirmation, I made it clear at that time that I disagreed with her on many positions that she believed in, but that I would not vote in accordance with the dictates of whether I believed with her philosophy, but rather would vote on the basis of whether I respected her legal ability, her legal experience, and her integrity. And it was for that reason that I voted for her confirmation, even though I knew I would disagree with her on many issues.

What is the right wing of this country demanding from our judicial nominees? What is it they have in mind for the basic constitutional rights which the people of this Nation have?

If they want to change the Constitution, or the law, let us do it in the traditional way, not by exacting from judicial nominees commitments in advance as to how they will adjudicate certain issues. Let us not revise the Bill of Rights from the bench.

I think that the issue of the confirmation of Mr. Rodriguez has highlighted this issue, and probably put many of these issues to rest, and we will not see their ugly head rise again.

I do not know whether you favor or oppose the equal rights amendment. I favor it. I do not know whether you favor or oppose capital punishment. I oppose it. I do not think that is relevant. I do not think it is relevant in deciding to confirm you as a Federal judge, as to whether you and I agree on that issue.

I do not believe it is appropriate to insist you meet some idelogical test regarding abortion, or gun control, or school prayer, or any other single issue, as long as you will do your best to follow the law of the land.

The Senate has an obligation to decide whether or not you have the legal ability, experience and integrity to serve as a Federal judge. I believe that you do, and I feel certain that my colleagues will arrive at the same conclusion.

But because the issue came up in connection with your nomination, I think that this may very well be one of the most fateful nominations that this committee has had to discuss, or to consider, because I think the chairman of this committee stated it very well, when he said:

> But I think we better decide here and now, coming this year to be fair to everybody. That if any member of the committee, on either side, had questions about a nominee, that they come to the hearing, and propound those questions there. Otherwise, I think there can be a delay on one side, a delay on the other side, and it is not fair to the nominee, and it is not fair to the President, and it is not fair to the public.

This was the statement of our chairman. I join with him in that statement, and I look forward to having the privilege for voting for your confirmation to the Federal bench.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

I think we ought to put into the record both the questions addressed to the nominee, and his responses, so if that could be entered in the record, Mr. Chairman.

The CHAIRMAN. Any objections?

[No response.]

The CHAIRMAN. If not, it is approved.

[The information follows:]

QUESTIONS BY THE HON. JOHN P. EAST, THE HON. JEREMIAH DENTON, AND THE HON. ORRIN G. HATCH FOR JOSEPH H. RODRIGUEZ, NOMINEE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1. Do you believe that the Constitution guarantees a "right to privacy"? If so, please indicate the constitutional sources of that right, its precise nature and its limitations.

The Constitution does not specifically identify the "right to privacy". The phrase, however, may have several meanings in terms of constitutional analysis. A right to privacy is protected by the Fourth Amendment's restriction on governmental search and seizures. The First Amendment has been held to protect some rights to privacy in speech or association.

But in terms of due process and equal protection, the "right to privacy" has been interpreted to mean a right to engage in certain highly personal activities. Specifically, it has been defined in matters of marriage and family life. Recently, the right of privacy has been discussed throughout the United States concerning personal medical treatment decisions. The Court in Roe indicated that even though the privacy right is not absolute, it does apply to personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty."

It is therefore fair to suggest that the right of privacy was demarcated by the Supreme Court. As a result, any limitation on matters now decided will have to await further action by the Supreme Court or appropriate legislative activity.

2. (a) In his dissent to the majority opinion of the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), Justice Byron R. White made the following statement: "As an exercise of raw judicial power the Court perhaps has authority to do what it does today, but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court." Do you agree or disagree with Justice White's statement? Why or why not?

(b) In his dissent to the same Roe opinion, Justice William H. Rehnquist made the following statement: "The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the state may impose upon each one partakes more of judicial legislation than it does of the determination of the intent of the drafters of the Fourteenth Amendment." Do you agree or disagree with this statement? Why or why not?

These questions directly raise the issue of the correctness of the Roe decision. To engage in criticism of the Supreme Court could be interpreted to mean that I would be unable to impartially determine a similar issue that might be presented at a future time. There could also be a more serious appearance of impropriety if it seems that I have pledged to take a particular view of the law. An essential ingredient of justice is the appearance of justice. The called for response could affect that appearance.

On June 15, 1983 the Supreme Court decided City of Akron v. Akron Center for Reproductive Health Inc. The litigation addressed the constitutionality of several provisions of an ordinance enacted by the City of Akron, Ohio, to regulate the performance of abortions. The majority of the Court stated:

> These cases come to us a decade after we held in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to regulate the performance of abortions. And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

A district judge is bound by oath to respect the authority of the Supreme Court and its interpretation of the Constitution.

3. (a) In Roe v. Wade, the Supreme Court determined that even the "viable" unborn human fetus is not a "person" as that term is used in the Fifth and Fourteenth Amendment to the Constitution. Do you believe that a "viable" fetus is a human being? If so, do you agree with the Court's finding that the "viable" fetus is not a "person"? If so, on what basis can a valid constitutional distinction be drawn between a "human being" and a "person"?

This question concerns the definition of human life and the legal consequences which attach to that definition. It also addresses the correctness of the Court's determination. In Roe, the Court said:

> The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

After a review of the word "person" found in the Constitution, the Court said:

> All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

As a federal district court judge, I would be bound to follow the decisions of the United States Supreme Court including the Roe decision. I must respectfully suggest that it would be inappropriate for me to comment on other issues not covered by the Roe decision which might come before me as a federal judge.

(b) Is a child who is born alive after an abortion a "person" under the Fifth and Fourteenth Amendments"? Does the "right to an abortion" that the Court created with its Roe decision have any application after a child is born alive as the result of an abortion?

The Roe decision concerns the right of a woman to control her own body and does not speak to the question of a child born alive after an abortion. The opinion does state, however, that the Constitution does not define "person" in so many words. But in the instances that it does, "the use of the word is such that it has application only postnatally".

I do not believe it would be appropriate for me to comment on matters beyond the holding of Roe at this time.

(c) Is a handicapped, or severely handicapped, child born alive a "person" under the Fifth and Fourteenth Amendments to the Constitution?

The presence of a handicapping condition does not alter a child's status under the federal Constitution. Please refer to my answer to 4 (a).

4. (a) Does the "right to privacy" from which the Roe v. Wade abortion privacy doctrine of the Supreme Court is derived have any application to any right of the parent of a handicapped newborn child to decide whether to provide him or her with life-saving medical care, and/or ordinary care in the form of nutritional sustenance and liquids (whether by natural or intravenous means)? If so, why? If not, why not?

I do not believe it would be appropriate to comment on the position I might take in a case that might come before me as a federal judge. I can say, however, that as Public Advocate, in furtherance of my statutory mandate to protect and advocate the rights of persons with severe disabilities, N.J.S.A. 52:27E-44.1 et seq., I have argued in the case of Claire Conroy, 98 N.J. 321 (1985), that disabled people have the same privacy rights as all other members of society and that decisions to terminate life-sustaining treatment administered to such persons should be carefully scrutinized by the courts, regardless of who the proponent of terminating such treatment might be. For this reason, we asked the Supreme Court to distinguish the handicapped from the dying and to explicitly reject the use of such notions as "personal worth" and the "quality of life" in any decision-making regarding the discontinuance of life supports.

(b) Do you believe that legislation ever can be held to be invalid because those who enacted it did so based on the belief that the conduct proscribed is morally wrong, or that an activity or institution encouraged or helped by the legislation is morally right? What difference to the Administration's case, if any, does it make whether such moral beliefs are based on a belief in the existence of a Supreme Being?

Legislation should not be invalid simply because those who enacted it did so based on the belief that the conduct proscribed is either morally right or wrong. Laws addressing gambling and lotteries, red light districts, obscenity, intoxicating liquor, and drugs are but a few possible examples. A reference to the Supreme Being, however, could affect the neutrality principle central to the Establishment Clause and Free Exercise Clause of the First Amendment.

5. In 1972 the Supreme Court in Furman v. Georgia, 408 U.S. 238, struck down Federal and state death penalty statutes that allowed for unguided discretion by the trier of fact to determine whether or not the death penalty should be imposed. On February 22, 1984, through the able leadership of the distinguished Chairman of this Committee, the Senate passed by a vote of 63-32, S.1765, a bill to establish constitutional procedures for the imposition of the sentence of death for certain federal offenses. What is your view on the death penalty?

The Supreme Court has held that the government may impose the death penalty on persons for certain crimes without violating either the due process clauses or the Eighth Amendment prohibition of cruel and unusual punishment. To comport with these guarantees, statutory systems must provide for imposition of the death penalty only for the most serious criminal offenses and only when there is a fair system for selecting those convicted criminals who shall die from those who will only be imprisoned. As a district court judge, I will be bound by the guidelines and mandates established by the Supreme Court.

6. The Department of Justice recently noted that the number of prisoners challenging the validity of their state convictions through Federal habeas corpus petitions rose nearly 700 percent from 1961 through 1982, but only a small number of inmates were successful in gaining any type of release. In an attempt to control the flow of frivolous collateral attacks on a criminal defendant's convictions, the Senate, again through the able leadership of Chairman Thurmond, passed on February 6, 1984, S.1763, a bill to reform current habeas corpus procedures.

In your view, should any limits be placed on criminal defendant's ability to collaterally attack this conviction? If so, what are the limits?

Frivolous collateral attacks on a criminal defendant's conviction do not serve the defendant, the criminal justice system or the public. The Supreme Court has intimated its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Also, proper application of 28 U.S.C.A. Section 2254, which is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale and/or multiple petitions might be a response to the problem.

The statutes and rules which address this issue are always subject to review and change by the Congress of the United States and the Supreme Court.

7. On February 7, 1984, the Senate passed S. 1764, a bill which limits the use of the Exclusionary Rule by providing that evidence obtained in a search or seizure and which is otherwise admissible as evidence will not be excluded

in a Federal trial if the search or seizure was undertaken in a reasonable, good faith belief that it conformed to the Fourth Amendment.

Do you believe that there should be any limits placed on the use of the Exclusionary Rule? If so, do you believe that S. 1764 or this type of limitation is appropriate?

Justice Blackmun, in his concurring opinion in United States v. Leon, 104 S. Ct. 3405 (1984) said:

> "If a single principle may be drawn from this Court's exclusionary rule decisions, from Weeks through Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom. It is incumbent on the Nation's law enforcement officers, who must continue to observe the Fourth Amendment in the wake of today's decisions, to recognize the double-edged nature of that principle."

The Supreme Court in United States v. Leon and the companion case of Massachusetts v. Sheppard held that Federal law does not require the exclusion of the disputed evidence. The exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid.

8. The First Amendment forbids the establishment of a State religion. The First Amendment also prohibits interference with the free exercise of religion. This second prohibition apparently is often overlooked. Please share with the Committee your views on the free exercise clause as it relates to prayer in public schools.

The Supreme Court has on several instances considered the question of prayer in the public schools. It has found that the First Amendment was violated with respect to the establishment and free exercise clauses when a particular prayer was mandated, even though it is nondenominational in character. This is so even though individual pupils may seek to be excused from the classroom. The Court has also prohibited certain readings from the Bible. This prohibition, however, did not extend to readings from the Bible which were read in connection with studies that were done on a purely academic manner. There is also Supreme Court authority that religious references in official ceremonies, including some school exercises, will be allowed as part of our secularized traditions. This issue has generated great public concern. New Jersey recently enacted a statute which has been determined unconstitutional and is now pending determination on appeal. I also understand that the Supreme Court is in the process of considering a similar issue. I feel it would be, therefore, inappropriate for me to comment on pending litigation. A final determination will, of course, be dictated by the opinion of the Supreme Court.

9. Is it unconstitutional for state or local governments to give tuition vouchers to parents of all children who attend nonpublic schools? Does it make any

difference whether most of these children attend religious school, provided that the law makes no distinction between religious and nonreligious schools?

There is very little state aid that may go to religious primary and secondary schools without violating the Establishment Clause. As the Supreme Court has held that these schools are permeated by religious teaching, any significant aid will have a high potentiality for having the effect of aiding religion. The Court has been quite strict in applying the purpose-effect-entanglement test to programs. It would appear that the following forms of aid have been allowed: (1) governmental services such as police protection, fire protection, and water service; (2) reimbursement for student transportation costs where no preference is given to students attending religious schools; (3) furnishing textbooks to students where the books are of a purely secular nature and where public school students also receive textbooks; (4) property tax exemptions for the school and church property as part of a general exemption for many kinds of nonprofit activities; (5) releasing the students from public school for a limited time so that they can attend religious instruction away from the public school; (6) the provision of limited health and remedial education services. More recently, the Supreme Court upheld a statute allowing state taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks and transportation for their children attending elementary or secondary private schools.

10. The Second Amendment to the Constitution states that "a well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." In light of that constitutional prohibition, to what extent, if any, do you feel that Congress could curtail the right of the people to keep and bear weapons that are of value to common defense.

The Second Amendment has been construed to mean that the right to bear arms is not applicable to the states since it is perceived as primarily a guarantee that the federal government would not interfere with the state militia. This allows the states to reasonable regulate the use of weapons under their police powers.

11. Would you give your present personal position with regards to the Equal Rights Amendment?

The proposed Equal Rights Amendment, as regarded by its proponents, would make sex a prohibited classification with two exceptions, one relating to personal privacy and the other to physical characteristics unique to one sex. The Amendment, if construed as indicated by the Senate Reports, would remove uncertainty on two issues: (1) classifications disfavoring men as well as those disfavoring women would be disallowed, and (2) defenses for differential treatment, unless directly and narrowly focused on personal privacy or physical characteristics unique to one sex, would be eliminated. Passage of the amendment will result in sex-based classifications being given treatment analogous to that presently given racial classifications under the Fourteenth Amendment.

The impact of the proposed Amendment has been discussed mainly in the terms of three areas: protective labor legislation, family support laws, and military service.

This Amendment has essentially become a political question. If passed, it would receive Fourteenth Amendment status. At that time, a district court will be required to follow its mandate.

12. (a) What did the Supreme Court hold in Regents of the University of California v. Bakke, 438 U.S. 256 (1978)? Do you believe that this holding was correct? Why or why not?

(b) In his dissent to the majority opinion of the Supreme Court in Fullilove v. Klutznick, 448 U.S. 448, (1980), Justice John Paul Stevens noted that the compelling government interest of curing the effects of past racial discrimination will justify a classbased infringement of the legitimate interests and expectations of innocent third parties only to the extent necessary to restore proven discriminatees to the position they would have occupied in the absence of the discrimination. What role should affirmative action type remedies take in dealing with individuals who have not been the victims of discriminatory practices?

In Bakke, a white male whose application to state medical school was rejected, brought an action challenging the legality of the school's special admission program under which sixteen of 100 positions in the class were reserved for disadvantaged minority students. The Supreme Court concluded that racial and ethnic classifications of any sort are inherently suspect and called for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, a special admissions program which forecloses consideration to persons like Bakke is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause.

In Fullilove, the question of "past victims of discrimination" was addressed as follows:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible... The actual 'burden' shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. Moreover,

> although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

This question continues to generate much discussion and redefinition as evidenced by the case of Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). In this case, a worker moved to restrain a city from implementing a layoff proposal in a manner which affected minority firemen. The opinion on p. 2580 reflects the following:

> Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination nor any award of competitive seniority to any of them. The Court of Appeals' holding that the District Court's order modifying the consent decree was permissible as a valid Title VII remedial order ignores not only the ruling in Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also the policy behind Sec. 706(g) of Title VII of providing make-whole relief only to such victims.

As a federal district court judge, I would be bound to follow the decisions of the United States Supreme Court in this area.

13. (a) Do you believe that Brown v. Board of Education, 347 U.S. 483 (1954) was correctly decided? What disagreements, if any, do you have with the language or reasoning of the Court's decision in that case?

(b) Do you believe that Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), was decided correctly? If so, do you believe that there is a conflict or tension between the constitutional right to color-blind treatment that was announced in Brown and the right (or, if it makes a difference, the remedy) of race-conscious school assignment that was announced in Swann? If so, how do you reconcile this tension or conflict?

To engage in criticism of the Supreme Court could be interpreted to mean that I would be unable to impartially determine a similar issue that might be presented at a future time.

This is another area that is subject to continuing definition and change as evidenced by the case of Milliken v. Bradley, 418 U.S. 766 (1974). There,a majority of the Court prohibited district courts from fashioning remedies that included more than one school district absent any finding that the other included school districts have failed to operate unitary, integrated school systems or that the boundary lines of the affected school districts were established with the purpose of fostering racial segregation.

The answer ultimately defining the legal balance between the degree of affirmative movement which appears to discriminate in favor of one group as opposed to the "color-blind" requirement of the Fourteenth Amendment will have to await further clarification by the Supreme Court. The cases mentioned above indicate that adjustments are being made and may continue to be made in the future. The district court will be required to follow the mandates of the Supreme Court.

14. (a) What limitations, if any, do you believe there are on the constitutional power of Congress to enact exceptions to the jurisdiction of the Federal courts and regulations of this jurisdiction?

(b) What are the sources of these limitations?

Article III. Section I, states as follows: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This language clearly indicates that the Constitution itself provides for a Supreme Court; however, it does not similarly mandate lower federal courts. One prominent commentator of American Constitutional Law has observed with respect to this provision of Article III:

> [S]ince Section 2 [of Article III] provides that "the Supreme Court shall have appellate jurisdiction; both as to Law and Fact, "only such Exceptions; and under such Regulations as the Congress shall make," it would be anomalous to hold that Congress lacked a similar power of "exception" in dealing with courts of its own creation. Tribe, American Constitutional Law (1978 ed.) at page 33.

However, I recognize that the Supreme Court of the United States has imposed restrictions on the exercise of Congress' power in this regard, see, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1872); Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1956), and as a federal district court judge I am required to follow the decisions of the Court in this area.

I am also aware of debates among scholars and members of Congress relating to proposed legislation restricting the jurisdiction of federal courts. Since these debates might eventually result in legislation that expands or restricts the jurisdiction of federal courts and since this legislation might be presented to me in my capacity as a judge, I do not believe it would be appropriate or proper under the Canons of Judicial Conduct to comment on the position I might take with respect to particular issues that might come before me.

(b) There is a general consensus that Congress may not violate other provisions of the Constitution in imposing limitations on the appellate and general jurisdiction of lower federal courts. See, C. Wright, Federal Courts, p. 35 (1983 Ed.)

15. Section 9 (a) of the National Labor Relations Act states: Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a union appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment ...

Keeping in mind that unions are private associations rather than governments, do you think that the granting of exclusive representation powers to unions by the National Labor Relations Act is unconstitutional?

The constitutionality of the National Labor Relations Act, and in particular Section 9 (a), has been sustained by the Supreme Court of the United States. National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 44-46, 57 S. Ct. 615, 626-628 (1937). In this decision, the Court recognized the power of Congress under the Commerce Clause of the Constitution to determine that "free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace ..." 301 U.S. at 45, 57 S. Ct. at 627. The Court, therefore, deferred to the will of Congress and concluded that the exercise of Congress' will in the NLRA was constitutional, while recognizing that Congress is free to develop a different policy in the future.

A federal district court judge is bound to follow the constitutional acts of Congress.

16. Do you concur with the Supreme Court's decisions in Abood v. Detroit Board of Education and Ellis/Fails that mandatory service fees collected from non-union members under the jurisdiction of an exclusive bargaining agent can only be used to pay direct collective bargaining and grievance administration costs?

In Abood, the national interest in labor peace, fostered by the collective bargaining process, was deemed sufficiently compelling to justify some intrusion upon the employees' rights to associate. Activities in political spheres could not be so justified; thus any political expenditures not germane to the union's duties as a collective-bargaining representative could not be financed from fees paid by those who affirmatively objected to the union's ideological viewpoint. This issue was recently raised in the Third Circuit. This Court followed the guidelines expressed in Abood. For me to engage in criticism of the Supreme Court and the Third Circuit could be interpreted to mean that I would be unable to impartially determine a similar issue that might be presented at a future time.

17. In United States v. Emmons, the Supreme Court affirmed a District Court ruling that the Hobbs Act did not prohibit the use of violence in obtaining legitimate union objectives. What is your analysis of the Emmons decision?

In United States v. Emmons, 410 U.S. 400, 93 S. Ct. 1007 (1973), the Supreme Court was faced with a question of statutory interpretation of the Hobbs Act, 18 U.S.C. Sec. 1951. The Court reviewed the statutory language and legislative history of the Hobbs Act, as well as prior reported cases in the area, in concluding that Congress did not intend that the Hobbs Act should reach the use of violence, which is readily punishable under state law, to achieve legitimate union objectives, such as higher wages in return for genuine services that the employer seeks. As a federal district court judge, I am required to follow the Supreme Court's interpretation of federal statutes. The Court made it clear in United States v. Emmons that Congress could enact a different statute by conveying its purpose clearly and with much more explicit statutory language. 410 U.S. at 411-12. The decision thus recognizes that Congress has the exclusive power to act otherwise if it chooses to do so.

18. List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments.

I served a five year term as Chairman of the New Jersey State Commission of Investigation (New Jersey's crime commission) from 1974-1979; Chairman, State Board of Higher Education, State of New Jersey, 1972-1974; Chairman, Juvenile Committee of Haddonfield, New Jersey, 1971-1975.

19. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm partnership, or other business enterprise, educational or other institution.

I am a former partner in the law firm of Brown, Connery, Kulp, Wille, Purnell & Greene; former member of the Board of Directors, Audubon Savings & Loan Association; former partner in the Professional Trial Lawyers Seminar; former instructor at Rutgers University Law School.

20. List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.

I am currently a member of the American Bar Association, House of Delegates; American College of Trial Lawyers; Fellow of American Bar Foundation; New Jersey State Bar Association (President 1978-1979); International Society of Barristers; Camden County Bar Association; Civil Practice Committee, Supreme Court of New Jersey; Associate Editor, New Jersey Law Journal; member and judge advocate, American Legion Post 262, Audubon, N.J.

I formerly served as a member of the Board of Trustees, Temple University, Philadelphia, Pa; Board of Directors, Camden Day Nursery; Board of Directors, Camden Housing Improvement Project; Executive Committee, Cooper Medical Center, Second Century Fund; Camden Regional Legal Services (President, Board of Trustees 1969-1971); former advisor and member, Spanish Civic Social Club; Board of Trustees, Family Counselling Service; former counsel to Girl Scouts of America, Camden County Region; former member of Disciplinary Review Board, Supreme Court of New Jersey.

21. List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

22. List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

From 1974 to 1979, while serving on the New Jersey crime commission, State Commission of Investigation, I did not engaged in any political activity. In 1980, I served as the Co-State organizer for John Anderson, and in 1981 as Co-State Campaign Chairman for Thomas H. Kean's gubernatorial campaign.

23. Itemize all political contributions to any individuals, campaign organizations, political party, political action committee, or similar entity of $15 or more for the past 10 years.

From 1974 to 1979, while serving as Chairman of the State Commission of Investigation of the State of New Jersey, I did not engage in any political activity or make any political contributions. Since that time, my contributions were as follows: Republican Executive Finance Club; Camden County Republican Committee; L.E.G.A.L. (Lawyers Encouraging Government and Law); John Anderson campaign; John Degnan gubernatorial campaign; Thomas H. Kean gubernatorial campaign.

Senator SIMON. I think my colleagues have covered the questionnaire. I would simply say to the distinguished Commissioner that I read over the questionnaire, I read over your answers, as I sat here, and I noted that until you get down to question number 18 you basically ducked the questions, and in my opinion, you did the right thing. You did the only proper thing that a nominee could do.

The question, as my colleague from Ohio has stated, is not what your personal views may be on anything. The question is, as a jurist, are you going to follow the law of the land, and we determine the law of the land, and I would simply commend you for the diplomatic way you ducked those questions, without offending anyone too much, and say I think you did the right thing.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

I have a letter here from Senator Denton. He requested I read it for the record.

> Thank you, Mr. Chairman.
>
> As I am currently involved in conducting a closed FBI oversight hearing, I will not be able to attend the Joseph H. Rodriguez confirmation hearing. I would, however, ask that in my absence you read the attached statement into the hearing record.
>
> Mr. Rodriguez, I welcome you to this confirmation hearing. I anticipate that when today's hearing concludes the Committee will be ready to act on your confirmation when we meet next week.
>
> As you may know, after your hearing during the 98th Congress, concerns were raised by individuals in New Jersey as to your qualifications to be a United States District Judge. As a result of those concerns, I joined Senators East and Hatch in propounding a series of questions to you.
>
> I have now received and reviewed your answers to these questions, and can say that in my mind those concerns as to your qualifications have been resolved.
>
> Accordingly, when the Judiciary Committee meets on April 25, I anticipate that I will vote in favor of reporting your nomination to the full Senate.
>
> I wish you best of luck in your new career.
>
> Thank you, Mr. Chairman.

We have a letter here from the Governor of New Jersey, Thomas H. Kean, in behalf of Mr. Rodriguez's nomination, and I will ask that be put in the record.

[The letter follows:]

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
CN 001
TRENTON
08625

THOMAS H. KEAN
GOVERNOR

January 9, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Thurmond:

I have asked President Reagan to renominate Joseph Rodriguez to the U.S. District Court, and I want to urge your support for his confirmation.

I believe that Commissioner Rodriguez is a man of impeccable integrity, who has used consistent good judgement in treating a variety of difficult issues in his current function as Public Advocate for the State of New Jersey. He has carried out his duties in an exemplary manner, and I have every confidence in his fidelity to the law, professional ethics, and his commitment to the oath of office.

Commissioner Rodriguez would be a superior judge and he is eminently well-qualified for this appointment. Your support in bringing him to the federal bench would be greatly appreciated. I have asked my Washington office to work with your staff to provide any information you may find helpful in considering the nomination.

Sincerely,

Tom Kean

Thomas H. Kean
Governor

The CHAIRMAN. We have letters here from Jim Courter, Member of Congress from New Jersey, and James O. Florio, Member of Congress from New Jersey, and ask, if there is no objection, that these letters go in the record.

[The letters follow:]

HOUSE OF REPRESENTATIVES
WASHINGTON D C 20515

JIM COURTER
NEW JERSEY

March 14, 1985

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
SD 224
Washington, D.C. 20510

Dear Senator Thurmond:

I understand that Joseph Rodriquez has been nominated by the President to the U.S. District Court in New Jersey. I am writing to support his nomination.

Currently, Mr. Rodriquez is serving as Commissioner of the Department of the Public Advocate in New Jersey. He has performed superbly in this position, proving himself to be a thoughtful and fair decision maker, serving the public interest with the utmost integrity and a true sense of fairness.

Commissioner Rodriquez' distinguished career includes a lifetime of dedication to the field of law and a longstanding involvement in and commitment to the Hispanic community throughout the state. He, without a doubt, would make a superior judge. I strongly urge your support for his appointment to the federal bench.

Sincerely,

Jim

JIM COURTER
Member of Congress

JAC/ams

cc: Joseph Rodriquez

JAMES J. FLORIO
1ST DISTRICT, NEW JERSEY

[illegible] RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
[illegible]

[illegible] AVENUE
STRATFORD, NEW JERSEY 08084
[illegible]

FIELD OFFICES
WOODBURY, N.J.
CAMDEN, N.J.

Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEES
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AND EMPLOYMENT SUBCOMMITTEE
HOUSING AND MEMORIAL AFFAIRS
SUBCOMMITTEE

SELECT COMMITTEE ON AGING
HUMAN SERVICES
SUBCOMMITTEE
HEALTH AND LONG-TERM CARE
SUBCOMMITTEE

MARCH 7, 1985

HON. STROM THURMOND
CHAIRMAN SENATE JUDICIARY COMMITTEE
U.S. SENATE
WASHINGTON, D.C. 20510

Dear Mr. Chairman,

I am writing to express my support for the nomination of Joseph H. Rodriguez to the U.S. District Court in New Jersey.

Mr. Rodriguez's proven ability and intelligence will make him a valuable addition to the federal bench in our state. He is a man of fine character and has been, and I am sure, will continue to be an excellent public servant.

As Public Advocate in New Jersey, Mr. Rodriguez has balanced the need for integrity with compassion in public office. He has upheld our legal traditions and he has demonstrated a firm commitment to maintaining the high standards of our governmental institutions.

Mr. Rodriguez is an excellent nominee and I urge your support for him.

Sincerely,

JAMES J. FLORIO
Member of Congress

PLEASE RESPOND TO: WASHINGTON ( ) STRATFORD ( )

The CHAIRMAN. Mr. Rodriguez, if you will stand up now and be sworn.

Do you solemnly swear that the testimony you are about to give before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. RODRIGUEZ. I do.

TESTIMONY OF JOSEPH H. RODRIGUEZ, OF NEW JERSEY, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

The CHAIRMAN. Please have a seat.

Mr. Rodriguez, do you have any members of your family here, and if so, would you like to introduce them at this time?

Mr. RODRIGUEZ. Yes, sir, I have.

I have with me here my wife of 30 years, Barbara, and then according to age, my daughters Lisa, who is a practicing attorney in the State of New Jersey; my daughter Barbara, who is now studying veterinary science; my daughter Joanne, who works in an exclusive ladies dress shop; and my daughter Kristin, who is a freshman at Stockton College in New Jersey.

The CHAIRMAN. Your children are all girls. I guess the boys will be hanging around your house pretty soon.

Senator METZENBAUM. I knew I was for you, Mr. Rodriguez. I have four daughters, and this proves the point completely.

The CHAIRMAN. Do you have any friends especially you want to introduce at this time?

Mr. RODRIGUEZ. Senator, not that I am aware of. [Laughter.]

I have the members of Governor Kean's office that are here, Alie Randlett and Jane Fliesbach, who have been accompanying me for the last several days, and I see other faces that have been accompanying me.

The CHAIRMAN. We are glad to have you with us.

Mr. Rodriguez, I have a few questions, and I will pass on to other members of the committee.

The New Jersey State Legislature's analysis of the department of the public advocate, dated April 7, 1983, states:

> The Public Advocate frequently institutes litigation first, rather than seeking assistance from the Legislature. This is generally a more expensive approach, in attempting to resolve issues addressed by the Public Advocate.

Mr. Rodriguez, how did you answer that criticism, and did you attempt to correct this area of concern during the following year of 1984?

Mr. RODRIGUEZ. Yes, I did. First, if I may take the privilege of just making one comment, I am sincerely grateful to Senator Hatch and Senator Metzenbaum and Senator Simon for finding the responses to the questionnaire acceptable, because rather than, Senator, with all due respect, being diplomatic, I think it is the way I have tried to live my life, that I tried to reflect in those answers, and I hope the public record does not prove me wrong.

But when I took over the office of public advocate, sometimes I think it is not quite understood that the advocate is a cabinet level position in the government of the State of New Jersey. It requires the oath of office, not only to follow the laws of the United States, and particularly of the State of New Jersey, but it also has the responsibility, as an attorney, to follow the codes of ethics.

When I took over the office, I took it over because I was nominated by Governor Kean. There were many actions that were then ongoing, where clients had rights to have their issues resolved. I looked over the office, and I determined that in today's complex society there might be a better way of addressing some of the more complex questions that society struggles with in order to resolve an issue.

It came to my attention that simply litigating would not always be the proper answer, because of the cost, and the time, and the expense, and casting people in adversarial positions when the issues could be extremely delicate. I then undertook to create, in the State of New Jersey, a New Jersey Center for Public Dispute Resolution, and I started through the year of late 1983 through 1984, and I am proud to say that in the winter of 1984, to the 1985 year the office that I established, of the New Jersey Center for Public Dispute Resolution received funding from the National Institute of Dispute Resolution. It received acknowledgement from the Chief Justice of the Supreme Court of the United States, because it is attempting to resolve delicate issues in a manner that I feel is more appropriate to the time today, because we are not always dealing with white hat-black hat, right and wrong, we are dealing with collisions of rights, and sometimes the collisions are better addressed by responsible conservation and dialog.

That office has now been acknowledged as the first in the United States, and I have a newsletter, and it, strangely enough, contains my photograph with the Chief Justice of the Supreme Court of the United States acknowledging that this type of activity is certainly called for in today's complex society. That is how I attempted to address that comment, sir.

The CHAIRMAN. Mr. Rodriguez, the alleged analysis of your department continues.

> In addition, the public advocate follows a policy of seeking to redress issues in Federal court, rather than in State courts. As all the rights guaranteed under the Federal Constitution are guaranteed in the State Constitution, why does the public advocate initiate its actions in Federal courts?

Mr. Rodriguez, how do you respond to this question?

Mr. RODRIGUEZ. Sir, I think many of those comments go to a time when the litigation was commended before I received the authority to run the office, or the privilege of running the office.

I have brought very few, or the department has brought very few actions in the Federal courts since I have been the public advocate. Those that are appropriate are clearly asking for clarification under Federal law.

There was one that I recall specifically where an action had to be brought, and incidentally, the defendant in the case was the Governor of the State of New Jersey, who appointed me to the position, because they were addressing an issue dealing with auto emissions, and where, in order to bring down the lines of cars going through inspection, the State had the right to the safety inspection every other year, the auto emission was preexempted by the Clean Air Act, which is a Federal act, and the New Jersey law had to comply with the preexemption.

I have only brought, I think, no more than two or three in the entire time I have been there, and there are some 300 lawyers that function with the department.

The **Chairman**. Mr. Rodriguez, what is your own perspective on the recent trend in the Supreme Court toward stricter requirements of standing, and are you concerned that recent decisions in this area may deny aggrieved individuals an effective opportunity to bring their case to Federal court?

Mr. **Rodriguez**. Sir, the issue is with respect to standing?

The **Chairman**. Yes, Mr. Rodriguez.

Mr. **Rodriguez**. Standing is a rather unique issue, for this reason. The court certainly has a right to determine standing of parties who feel aggrieved, so they can have their matter decided by the court.

The confusion can come in if a court becomes aggressive to grant standing too loosely, and brings in a group, where in order to determine the issue it has to come into some tension. In trying to resolve too many individual different types of issues, I think the court can run into quite a bit of trouble in being too loose with the issue of standing. I think standing has to sort of contain the issue to its uniqueness so there can be a follow through by the court, once the court makes the determination, because at the end of it you really have to be concerned that the public looks to see what was done, with the confidence that justice has, in fact, prevailed, and not to try to be so broad ranging, where the effectiveness of the order can work against that confidence that I think is so critical in our society.

The **Chairman**. Mr. Rodriguez, there are those that allege that, as public advocate, you intervened in the *Mount Laurel II* case, by advocating a position to overrule municipal land use and zoning ordinances, which were adopted by local municipal governing bodies.

Your action would mandate that municipalities be required, at enormous cost, to provide housing for low and moderate income persons throughout the State.

The committee has been advised that the New Jersey Legislature has often rejected such legislative proposals, and reaffirmed the right of municipalities to control their own zoning, property development and land use.

Mr. Rodriguez, in order to clarify the record, would you tell the committee the facts surrounding your action in the *Mount Laurel II* case, as briefly as you can?

Mr. **Rodriguez**. Yes, sir; I would be happy to, and I would like to start, as you know, by attempting to clarify one of the confusions.

When I became public advocate, and swore an oath to my office, not only as the advocate, but as an attorney, the *Mt. Laurel II* cases were already in litigation, and they were already argued, I believe, one time, before the Supreme Court.

When I appeared for confirmation, I made the statement very clearly that the position of the advocate would be, in fact, to follow the mandates of the Supreme Court of New Jersey when it is decided.

All the cases were stayed. The issue really comes out of 27 cases that were filed in Morris County. They were filed by my predecessor. The cases of *Mt. Laurel II* dealt with another county, but it certainly would include what occurred in that county. The 27 cases were stayed.

The issue in the *Mt. Laurel I* case was, and our Supreme Court held, that artificial exclusionary barriers were unconstitutional under the New Jersey Constitution. Years later, *Mt. Laurel II* comes up, and all the cases are stayed, and the Supreme Court now looking out over a couple of years of what it considered to be inaction, decided *Mt. Laurel II.* It did not deal with the issue of developing municipality, the developing municipality has to comply with a certain fair share formula.

Mt. Laurel II came out, and actually reconstructed where the growth areas of the State would be, by adopting the guide plan which was in existence, which told where the development should be in the State.

I looked at *Mt. Laurel II,* and strangely enough, because of the configuration of the growth area, and the definition that was included, I attempted to dismiss 13 cases that were found to be in the limited growth area, the agricultural areas, the conservation areas, and I was sued, to try to challenge my ability to settle out 13 communities that were part of the 27. The appellate division upheld my discretion.

What I tried to do was to make that litigation comport to the definitions of what the Supreme Court of New Jersey had dictated through *Mt. Laurel II.* In effect, all I did was follow my oath, and follow what the Supreme Court of New Jersey said was the constitutional way to go.

Sir, beyond that I do not know how to answer the tenor of the question, because all I did was follow what the Supreme Court of New Jersey did chronologically. I did not bring the suits that are the cause of the concern.

The CHAIRMAN. Mr. Rodriguez, the board of directors for South Jersey Chapter of the American Civil Liberties Union gave you their Civil Libertarian Award for 1984. This award was in part for your stand opposing the death penalty.

At your hearing before this committee in September of last year, I asked whether you would have any hesitancy in imposing capital punishment if a jury so found, and if the law provided for it, and you responded as follows:

> None at all, sir, because I think that goes to the answers that I have been trying to give. I think the main respect has to be to the law, to the duly constituted law. And if it is there, it is not within my power to rewrite it.

Mr. Rodriguez, you were commended by the ACLU for your stand opposing the death penalty, and yet you told the committee that you would have no hesitancy in imposing capital punishment.

Do you reconcile that by saying, regardless of what your personal wishes are, that if the law required a death penalty, that you have no hesitancy in imposing it?

Mr. RODRIGUEZ. Sir, I would have no hesitancy, because I think, as comes through from all of my answers, the only thing that I feel would be commanded me would be to follow the law. That would be my oath.

The CHAIRMAN. Regardless of your personal wishes, you would feel obligated to follow the law?

Mr. RODRIGUEZ. Sir, as it has been in every issue that has been raised, yes, sir.

The CHAIRMAN. Mr. Rodriguez, an article in the February 4, 1984 issue of the New Jersey State Ledger, entitled "Death Penalty Under Multi-Faceted Assault," states:

> Although the U.S. Supreme Court has said the death penalty is not in violation of the Federal Constitution as being cruel and unusual, the public defender's office wants the New Jersey Supreme Court to find the penalty violates the prohibition against cruel and unusual punishment contained in the State Constitution.
>
> The public defender's office says that the punishment does not deter homicides, that paroled murderers "very rarely" kill again, and that the death penalty is simply a "meaningless gesture" of "pure revenge" that "represents the darker side of humanity."

Mr. Rodriguez, is it your view that the death penalty is just a "meaningless gesture of pure revenge" and would you explain your answer?

Mr. RODRIGUEZ. Yes, I think, No. 1, it has to be made clear that my position is as it always has been, that I can follow the law, because if you look through my career, including the 5 years that I served with the State Commission of Investigation, which is the Crime Commission, and I incarcerated top organized crime figures for failing to testify, for civil contempt, after the grant of immunity, I was not praised by some of the organizations that praised me later. But it was the law that I was following, and that is 5 years of history that I am proud of.

What occurred here is capital punishment was passed in New Jersey again, after I became—after I became—public defender, public advocate.

What is important for our State is that the will of the people be done. Where the will of the people acknowledged that capital punishment is now their wish, the statute still has to meet the configuration of what is constitutional, because some day when the first execution takes place the Governor that I respect is going to be approached with a writ of clemency, and he has a right to look through his cabinet, and say to the attorney general, did you prosecute it vigorously, yes, and Mr. Defender, yes, did you defended vigorously, and then the judgment is his. We owe the State and its citizens that kind of accountability.

I could not sit back, and say, I refuse even to question it.

Now, for the exact words, the exact words, sir, were not mine. The appellate section is a section that works, and has been working vigorously, long before I became a defender. Upon my first nomination I excused myself from an issue, knowing if I would be required to make comments, the comments would be those of an aggressive advocate, and not knowing the course of my nomination, I did not want to confuse two things that to me that are so important, and that I respect so greatly.

What has to be honored is the law. I did not want to be put in a position of sending conflicting messages, when my oath is to be an Advocate. I, therefore, allowed the appellate section to handle it to the best of their ability.

The CHAIRMAN. As a trial judge, I have sentenced a number of people to death, after the jury has found them guilty. As a practicing attorney who has defended a number of people tried with felonies, naturally I, as other trial lawyers, would pursue a course that they felt was best for their client, and would pursue allegations that they felt would be in their favor.

I presume that in your practice you took positions to represent your client to the best of your ability. But as I understand you now, you are telling us, though, there would be no question but that you would follow the law under all circumstances?

Mr. RODRIGUEZ. Sir, that is true. What I think is so critical, and why I appreciate the opportunity to be here, and let me say, not to prolong this, but I for one feel, and I did not make any public comments with respect to the process that is taking place—I understand there is a very honest and legitimate tension that occurs between the constitutional, legitimate right of this Senate to advise and consent.

The tension occurs because of the way, and the ability of someone who has to respond without a hearing, as though they are prejudging, because fairness in a system is so important.

From the first time I learned the Constitution and the people in the State of New Jersey know this was as a result of my father being a survivor in an Atlantic ship, a ship the Germans sank 3 miles off the shore of Atlantic City. He was a passenger. He had to learn the Constitution to become an American citizen.

From that day to this, if you look at any of my actions, they have been supporting the law. Whether people have liked it or disliked it, I have honored the law, because the one thing I learned from him was the respect that we have to have for our system. We need accountability and respect.

I have always respected the law, and sir, I can do that with almost anything our Supreme Court says is constitutional. I have no hesitancy, because I think if you look at my record, there is not one action I have taken that was not comporting with some declaration of constitutionality, by either the Supreme Court of New Jersey or of the United States. I have never chartered my own independent whim.

The CHAIRMAN. Mr. Rodriguez, you filed an appeal with the New Jersey State Supreme Court in May 1984, on behalf of Thomas C. Ramseur, who was convicted of a murder committed in Newark, NJ. This was his second murder conviction, in 1966 he pled guilty to having killed his wife, and served approximately 7 years in prison for that crime.

In your brief on behalf of Mr. Ramseur you stated, in part: "The death penalty is, per se, cruel and unusual."

Now, would you mind telling the committee what form of punishment you feel in a case of that kind would be appropriate for an individual if you felt that the punishment was cruel and unusual, or were you just taking a position that you were the attorney for the defendant, doing the best you can to defend your client, and again, that you would follow the law if you were appointed judge?

Mr. RODRIGUEZ. Sir, I would follow the law. But, again, you have to realize something, and I said earlier, when I excused myself, I did not even participate in the preparation of the briefs, but that is not to comment because that case is now proceeding through the courts of New Jersey. But what has been occurring is that New Jersey adopted the aggravating circumstances and the mitigating circumstances. The jury determined what the punishment should be.

Even during the process when those briefs were filed, my department appeared before the Senate Judiciary Committee of New Jersey to indicate to them how they can fine tune the statute itself, to be sure that prosecutors just do not simply fill the record with aggravating circumstances in an effort to get someone to plea to a case.

So it is an ongoing process, but if I may say this, and I think some of this may be in the atmosphere of some of the concerns over me, it is that New Jersey had a very aggressive supreme court. The New Jersey supreme court has been nationally known, and I have an article, as one of the boldest courts.

Under the 10th amendment, sir, my department of the public defender, and the people writing advocate briefs, knew that one of the open questions would be under the constitution of the State of New Jersey which parallels the Constitution of the United States. Both contain a cruel and unusual provision.

In order for the record to be fully responded to and answered, that should also be raised as an issue, so that our supreme court can decide that issue.

That is an advocate's position, and it is a position that preceded. Whatever occurs, I can still follow the law as pronounced by the U.S. Supreme Court.

The Chairman. Mr. Rodriguez, article III, section 1 of the Constitution invests in the Congress plenary power to ordain and establish such inferior Federal courts as it sees fit.

To what extent, as a direct function of that power, is Congress equally empowered to limit the jurisdiction of lower Federal courts over various classes of cases and controversies?

Mr. Rodriguez. Sir, that is a question that I attempted to address in the questionnaire, and to be very frank, it is a question of such proportion, and such legitimate debate now by scholars, that I do not know whether we know what the real answer is today.

We do know that the authority in article I is that there is the authority in Congress to limit. To what extent, I think it is the debate that is occurring today, and I honestly cannot even try to legitimately forecast what the resolution would be. But I do acknowledge that the words are clear, and that there is a power to limit to some extent. The extent, sir, I really do not know how to respond to, because it is beyond—I mean it is within such legitimate debate by scholars way beyond my capacity. I would not want to try to predict.

The Chairman. Mr. Rodriguez, would you care to give your opinion as to recommendations with respect to legislative draftsmanship to minimize what many Members of Congress view as a problem of judicial activism?

We have had examples of Federal judges taking over school districts, taking over hospitals, and taking over other institutions in the State, attempting to run them, and actually running them, giving orders, changing orders, and most students of the Constitution, I think, feel that there is a line of demarcation between the Federal and State governments, called the division of powers, and the States have all the powers that have not been specifically given to the Federal Government under the 10th amendment. I think it makes that plain.

What is your view of judicial activism? Do you feel that Congress should make the law, the Supreme Court should limit their jurisdiction to interpreting the law, or just how do you feel?

Mr. RODRIGUEZ. Sir, I think the issue of judicial activism has been heightened today, although you find throughout history it has been recurring as the imbalance of the three branches of the government seem to come in conflict with one another over a variety of issues.

I think today, and if I can, sir, with all due respect, suggest this, it may not be susceptible of clear definition. We do know the States are the reservoir, I think, of sovereign power, at least those powers not delegated through the Constitution to the United States.

Any time a court attempts to move in an area that is essentially a policy area that affects the unique details of the economy, it has to be extremely, extremely careful.

Again, the court decides cases by the evidence that is presented before it. If a court, with limited evidence, moves to obtain control over large agencies, you have to be concerned about its ability to accomplish that which it is attempting to do. If it does not accomplish, I think the confidence in what it is doing is destroyed, and you can really start to move against what it is you have to have when you have a court.

So to some extent it takes a great deal of restraint to know that you cannot go beyond the ability of the court itself, and if you are dealing with the unique details of the economy, that should first be decided by the policymakers of that State, which is the legislature. To try to jump in front of that could create, again, such a tension and clash that the confidence of the system then starts to deteriorate, and I think that would be unfortunate for a society that has to have respect for the rule of law. I do not know how you can translate that very clearly, except it is one of knowledge and of restraint.

There can be areas perhaps that can be confined, but I think essentially it comes from simply the ability to understand what it is that is occurring, and not to attempt to be the person—I envision, if given the honor of being the custodian of the Constitution, not the coauthor, and many times there is an effort to try to rewrite, I think we have to first follow and demand respect, because we do have the structures that can effect the change. That is the three parts of the Government, and I respect that.

The CHAIRMAN. I presume you have no difficulty in interpreting the 10th amendment as meaning that the States do have the powers, except those delegated to the Union?

Mr. RODRIGUEZ. Absolutely, sir, and that is why when my appellate section came to me and said that under that tenth amendment there is an argument that should be followed, it is in respect for that concept, that I approve. In short, I do.

The CHAIRMAN. Mr. Rodriguez, we frequently hear the argument that courts act in response to various social problems because a legislature has failed to act on its own. Simply because the legislature failed to act, should the court take unto itself some responsibility that should rightfully belong to the legislature?

Mr. RODRIGUEZ. I think, again, what occurs is that in order to respect the three branches of government, the legislative branch is the branch that should establish the policy, and clearly can do so through legislation, through congressional legislation. The court should interpret that. There should be rare occasions when you readjust that kind of a process because, again, to try to declare something before the policy is acknowledged by a legislature, I think what you do is you create that confusion again in a public that has to respect the law, because I think the ultimate success of our society has to be the respect for the law.

The CHAIRMAN. In many cases the courts have failed to take action in such cases, although I think if they had the power to act, and it was right for them to act, they would act in a certain way. But simply because it is a legislature matter, they have refrained from acting, and called attention to the fact that the Congress or the State legislature has not acted on that, and it should be a matter for them to act on.

Do you agree with that?

Mr. RODRIGUEZ. I agree if a court sees in those instances where the society pressures are such that a good faith comment should be made to alert the legislature to what is occurring, that the alert should be made in those cases where legitimately it is the pressurized community that is speaking.

The CHAIRMAN. In such cases, then the legislature, or the Congress should make that decision?

Mr. RODRIGUEZ. The Congress should respond, because in the final analysis the public has an opportunity to change the configuration of the Congress if, in fact, they do not respond.

The CHAIRMAN. Mr. Rodriguez, would you tell the committee if there are ever any circumstances under which a judge should attempt to establish new judicial precedents, and if so, what are the criteria that you would use in order to determine the propriety of reversing an existing precedent?

Mr. RODRIGUEZ. Precedent has a variety of ways of being analyzed. I think law as an instrument of justice has a capacity for growth, and that growth can take place in a variety of ways.

For instance, with the books of account, when all of a sudden you now have a computer, that a court can determine that that is a very different thing in technology, how that would be handled under the rules, and there are ways of expanding the growth of the law.

The areas where it becomes critical are where the step goes from what the growth of the law is, to a very sensitive policy area, that a court not having an army, and not having the ability to make it work necessarily that way, would start charting a course that can create turbulence.

I think then we have to be very careful, but there are many precedents that come naturally by the next logical, legitimate step in the process of law that traditionally have never caused any concern. It is the legitimate growth of the law.

I think that when we get into trouble is when that precedent moves against one of the other branches of the government. Then the issue of whether or not you are usurping powers becomes the question. But the legitimate growth within its structure I think traditionally has not been an essential concern.

So I think it is the nature of the case, and not necessarily the definition as to whether or not it is a precedent that is being established.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Again, Mr. Rodriguez, we welcome you to the committee.

I apologize for my laryngitis.

The distinguished chairman of the committee has asked a lot of questions I was going to ask, especially questions regarding judicial restraint. I think your answers have been very good, and I think that, if there is anything that this administration would be very tough on, it would be an overly adventurous judiciary, or judges that are going to make the law rather than interpret the law. Moreover, I think you have made it abundantly clear that you are not going to rewrite the Constitution, nor are you going to consider yourself a coauthor.

With your special knowledge you are going to interpret the law, and apply it, and basically abide by what the Supreme Court has declared to be the law.

As you and I both know, you can have a very definitive decision declaring what the law is, but there are all kinds of nuances that may sometimes come before you that are questions of original impact.

Mr. RODRIGUEZ. Sure.

Senator HATCH. All of these questions I think the chairman has asked have been very, very good.

Justice John Marshall once said that the words of the Constitution were not to be "extended to objects not contemplated by the Framers."

Could you give me your impression of his view, and whether you agree with it?

Mr. RODRIGUEZ. What was that again, sir?

Senator HATCH. John Marshall, of course, the great Chief Justice of the Supreme Court, in the early days of the country, said the words of the Constitution should not be "extended to objects," he said, but I believe what he meant was objectives, "not contemplated by the Framers of the Constitution."

Do you agree with his position, and with that particular statement?

Mr. RODRIGUEZ. In that context, I do, sir, because I think what he basically was saying is that the creation of the Constitution actually generates from the public, that if you go beyond that you have a serious question as to whether or not what you are doing is the will of the public, and because there is a mechanism for clearer definition, that it should not be the court that tries to try it out with a definition.

Senator HATCH. Some constitutional terms are broad, and could have many potential meanings, for instance, due process, equal protection, or even privileges and immunities, which may not be as important in the use of present constitutional law as the other two, or maybe not be as often used.

How would you seek to find out the meaning of these terms, and how important is it that judges seek the precise intent of the authors of the Constitution, of those terms, or the authors of those particular amendments on those terms?

Mr. RODRIGUEZ. I think to the extent what occurs is many times when a phrase is developed that the framers of the Constitution had had discussion with respect to what in their interpretation it should mean, and I think it is incumbent to stay within that meaning. There are times when the meaning can be readjusted, but it is readjusted within the four corners of what the framers meant. And I can suggest the due process, or cruel and unusual punishment.

We know if they talked about whipping someone, that if an issue comes up where you are amputating someone's hands, they may have not discussed it, but it is so clear within the concept of what they talked about, that it is not even an extension. It is a definition that maybe was not talked about before.

I think it is when you move beyond that realm, into areas that, again, control essential policy determinations, that you have to be extremely careful.

Senator HATCH. How important is it that the Federal courts respond to changing circumstances and evolving notions of society concerning these types of terms, or should the courts be involved in making those types of determinations?

Mr. RODRIGUEZ. I think the first extent to which they should be involved is to sound the alarm if, in fact, what they see is a legitimate concern being elevated, that perhaps it is not addressed directly within the power of the court.

I have seen where courts have actually done that. They have sounded the message when they see what it is that is occurring. I think that is the better process than attempting to try to resolve it immediately, because society many times cannot adjust.

Of course, there are issues specifically to the inalienable rights, and I do not think we are talking about those at all. I think we are talking about those that are the expanding amoeba-type expressions, in a sense that they cloak more than what perhaps was intended, and I think it calls for great judgment.

But I think the court can, if it sees something occurring, sound the warning where, in fact, it is very legitimate.

Senator HATCH. Whether or not you are for capital punishment or against it may not be the determining criterion to me, but I have a question on that subject. The opening sentence of the fifth amendment states that capital punishment is not to be imposed "unless on presentment or indictment of a Grand Jury."

The fifth amendment double jeopardy clause is a ban against putting anyone "twice in jeopardy of life" for the same offense.

The 14th amendment requires due process before anyone can be deprived of life. Since the explicit language of the Constitution, it seems to me, acknowledges the legal authority to impose the death sentence, is the eighth amendment, or any other provision of the Constitution a bar to the imposition of capital punishment in your opinion?

Mr. RODRIGUEZ. Sir, it has been ruled by the U.S. Supreme Court that it is not.

Senator HATCH. You agree it is not, even though you may philosophically disagree with the Court's opinion, or personally disagree with the Court's opinion?

Mr. RODRIGUEZ. But the voices that have attempted to suggest it is are certainly loud voices, but the Supreme Court has decided it is not cruel and unusual.

Senator HATCH. I think that is a very good statement because there are good arguments on both sides of that issue, as there are on most of these issues.

Mr. RODRIGUEZ. Yes, sir.

Senator HATCH. That is why anybody who thinks that you ducked the questions that were asked by Senator Denton and Senator East, that I put my name to, may not have had the same in-depth legal experience as you have had in these particular areas.

As a Federal judge, would you have any difficulties under appropriate circumstances implementing any portions of the Federal Criminal Code, which might call for the death penalty?

Mr. RODRIGUEZ. No, sir, I would not.

Senator HATCH. You indicated you would not. All right. I just wanted to put the question that way so that everybody would understand, you know, that you are willing to apply the law, even though you disagree with that particular law.

Mr. RODRIGUEZ. If I may, again, and I do not want to prolong the occasion, my sense of fairness tells me that I am being measured by comments that I am making here, I at no time want anyone to think what I am doing is attempting to give an answer that I find to be acceptable.

Senator HATCH. I never deduced that. I think you are being very honest and straight forward, and I felt you were in your answers to the written questions as well.

Mr. RODRIGUEZ. When I go back and say if you look at the way I lived my life, and looked at the way I have handled the offices I have handled, the fact that I have been in public life for 26 years in the State, and they are still asking themselves how does he really feel, I think underscores that I have simply followed the law.

Senator HATCH. I think that is true.

In recent years, the Federal courts have been locked in a continuing controversy over the difference between a colorblind set of public policies as opposed to a color conscious set of public policies, such as, for instance, affirmative action. That may be one of the most important issues of our present day.

What are your thoughts with regard to these general legal issues? Perhaps I could ask a more specific question of you.

Identifying discrimination has occasionally been a thorny issue for the courts. The Constitution has been interpreted to require a showing of wrongful intent, rather than a mere showing of disparity impact, or a statistical effect, in order to be considered constitutional discrimination.

What are the merits of the Constitution on this point, for instance, and what factors should a Federal court consider in determining whether a particular act or policy is discriminatory, in your opinion?

Mr. RODRIGUEZ. Sir, again, I think if we look at what is occurring today, that there are competing interests. That, No. 1, the court, when it has dictated the affirmative action part of the formula, has done so because it has found a compelling interest to put something on the scale that seems to be working to the disadvantage of another group.

All right. That is the affirmative action and the colorblind concept that has been raised, is to say that seems to be intention, with colorblindness. We do know that what has been occurring, and it occurred in the *Memphis* case, is that the court, under title VII, is now saying that the compelling State interest is somewhat tempered because this group has not, in fact, been in issues of discrimination, and therefore, they will not allow that imbalance to take place.

What has occurred just this very week, that the Supreme Court, the Supreme Court of the United States, has now undertaken to decide a case where that balance is being approached on a constitutional basis, rather than on a title VII basis.

Senator HATCH. It may really define what they said.

Mr. RODRIGUEZ. I think what will occur is we will now have an answer. It might answer some of these problems, these delicate society problems, that would now be incumbent upon a court to follow.

Senator HATCH. In the written questions you answered, was a question regarding the potential of harm, or potential to harm innocent third parties involved in granting affirmative actions to individuals who have not themselves been the victims of discriminatory practices.

You answered by noting that in *Fullilove*, the Supreme Court permitted affirmative action despite harm to innocents.

You indicated there was a difference between the *Fullilove* case and the *Memphis Firefighters* v. *Stotts* case, which you indicated had moved in the opposite direction, and you just reindicated that here today. You conclude by saying you would follow the Supreme Court's decisions in this area.

How would you approach the task of reconciling this tough question, and a good question, I think? How would you approach the task of reconciling the *Fullilove* decision with the *Stotts* decision, or *Memphis Firefighters* decision? And when you say you would follow the Court, the Court has not resolved that.

How would you do that, if you had the right to resolve that issue? You may not want to comment on that.

Mr. RODRIGUEZ. It would be very difficult at this time, and I think only because out of respect for what I think the debate is that will occur after the Supreme Court handles the matter it took before it, because I think it is aware of that very tension that is existing.

Senator HATCH. You are waiting, as I am, for the Supreme Court to ultimately resolve the problem of what appears to be a conflict between *Fullilove* and *Stotts*.

There are certain lawyers who might say there is no real conflict that they can distinguish.

Let us say that precise issue came before you, the issue between *Fullilove* and *Stotts*. Would you stay that case until the Supreme Court decided the issue, or would you try to decide it yourself? Let us say it is a nonjury decision.

Mr. RODRIGUEZ. If it was a question that was before the Court right at this moment?

Senator HATCH. Yes.

Mr. RODRIGUEZ. I would just say that the experience I had with the third circuit is they stayed a case that the Supreme Court is now handling with respect to another very sensitive issue.

Senator HATCH. You would stay the case?

Mr. RODRIGUEZ. Only if it was an issue that would be specifically decided within the context of that case.

Senator HATCH. Or at least you felt would be decided?

Mr. RODRIGUEZ. Yes. If not, I think what you are doing is you could very well be issuing false hopes, or again, such confusion against the confidence of the Court, that you have to weigh what that stay would mean.

Senator HATCH. I indicated to you earlier I do have troubles with the second amendment, and I think almost every western Senator does, because we value our right to keep and bear arms.

Can you conceive of any legislative restriction on firearm possession, or the use that might violate the Second Amendment to the Constitution?

Mr. RODRIGUEZ. Sir, as I understand the second amendment, it has always addressed the issue of the militia, the State being able——

Senator HATCH. That is one interpretation.

Mr. RODRIGUEZ. What I see occurring, as you look throughout, and even reflected somewhat in the crime bill that received the enthusiastic support from ~~Chairman~~ Thurmond, is that in there we find that the States, through the functioning of their police power, under the tenth amendment, have taken strides that have affected the utilization of a weapon, and I am speaking of the Graves' Act in New Jersey, that has a 3 year mandatory sentence for something that occurs with the use of a gun.

Even in this crime package, the 5-year mandatory, if, in fact, there is the use of a gun. So I think the way the posture is now, is that there is a definition of the second amendment that I do not think has been fully explored. If it is, it would be explored at the levels, I believe, of the Supr~~eme Court~~.

What the States have been doing in the meantime is utilizing their police powers under the 10th amendment, to provide a certain extent of regulation, and I think the ultimate acceptance of it certainly would have to be through the communities that are being affected by the regulation. But I see that as what is occurring out there now.

Senator HATCH. Thank you, Mr. Chairman.

Could I say one other thing?

The CHAIRMAN. Yes.

Senator HATCH. You need to know that in the past members of the Judiciary Committee have submitted questions after hearings, when questions have arisen, so you were not being singled out by that, and I personally do not think you were offended by any of those questions.

You answered them clearly. Some of them you said you felt you could not give your opinion on because it might be an issue that might appear before you, which is a legitimate answer, and something that we are interested in, how you do answer some of those questions.

Nor was there any indication by anybody who submitted those questions to you that if you did not answer any one of them the way they would like to see you answer them, that they would vote against you.

On the contrary, I think my record in the Senate has proven that I have never let any single issue make a sole determination of whether or not I vote for or against a judge. I think those who watch my performance on the Judiciary Committee have noted I feel very deeply about judicial nominations. Along with my counterpart on the Democratic side, I was one of two who led the only real fight against a judicial nominee over the last 9 years. By the way, that nominee was rejected because we just felt he was not qualified to be a district court judge.

So I feel very deeply about these matters. I was personally offended by some of the media coverage on this because they indicated that the reasons for the questions was not legitimate, or that it was a litmus test type of approach. Every one of those questions was legitimate. They were all more complex than Senator Metzenbaum has characterized them. Frankly, whether or not they were complex, they were questions by sincere members of this committee, and I do not think therefore, they should be criticized, or even questioned with regard to that, since they are members who are, I think, satisfied with your answers.

Second——

The CHAIRMAN. Senator Hatch——

Senator HATCH. If I could say one other thing, Mr. Chairman.

I may have written those questions differently myself, but I think they were legitimate, and I want to personally thank you for answering them, doing it with a good spirit of cooperation. I have been very impressed with you today.

I wish I had attended the prior hearing. Unfortunately, I was unable to do so at that time. I just want to personally thank you for being here. I am impressed with you, and as far as I can see, at this point I intend to support your nomination.

Mr. RODRIGUEZ. Thank you, Senator.

The CHAIRMAN. I might say that heretofore there has been no particular policy about questions, and many Senators have propounded questions, and candidates have answered them. However, in order to prevent any occurrence happening that might not be in the best interests of a candidate, or the best interests of an appointment, we are going to ask the Senators to come to the hearings hereafter, and propound any questions there, and the committee will have a questionnaire. They have one now, and the Democrats are thinking about getting up one, and the committee has one. We would like to have one questionnaire.

I am anxious for both sides to get together and compose this questionnaire, and that will be the questionnaire, and then anybody who wants to ask questions in addition to that can come to the committee and do it.

Senator HATCH. Can I ask you one question with regard to that procedure?

What if legitimate questions do arise after the hearing, that Senators did not know about before?

The CHAIRMAN. Then we can have another hearing, unless the candidate is willing to answer the questionnaire voluntarily.

Senator HATCH. I see. In other words, the Senators can submit the questions, and let the Judiciary Committee resubmit additional questions?

The CHAIRMAN. Through the committee.

Senator HATCH. Sure.

The CHAIRMAN. Let the committee submit the questions, and in that way I think we can avoid any embarrassment.

Senator HATCH. I think that is a good procedure.

The CHAIRMAN. We want to be fair to everybody, and I think that will be the best way to handle it.

I have an appointment with a distinguished U.S. District Attorney of South Carolina. This hearing is going longer than I expected.

Senator Hatch, I wonder if you could complete it, and if you do have to leave, if you will let Senator Simon complete it?

Senator HATCH. Yes, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator HATCH [presiding]. Senator Simon?

Senator SIMON. I might say to the daughters of the commissioner that they should be proud. I think he has handled himself very, very well.

Just two questions, really, Commissioner.

One is, we have a statement from a State Senator Cardinale, if I am pronouncing it correctly and which, among other things, there is this part of a sentence, in which he says that you have exhibited, and I am quoting, "an adherence to personal values with which I disagree."

I do not know what that statement means. You may not know what it means. Is there anything that suggests, as far as you know, that would not permit you to be a good and responsible Federal judge?

Mr. RODRIGUEZ. Not at all, sir.

Senator SIMON. Then we have an ethical consideration. Under Canon 2 of the American Bar Association's Code of Professional Responsibility—and, incidentally, you are to be commended for the very high rating you got from the Bar Association—but it calls for, and I am quoting, "Every lawyer, regardless of professional prominence, or professional workload, to find time to participate in serving the disadvantaged."

Could you outline, just briefly, what you may have done to live up to that part of the ethical code that you have as a lawyer?

Mr. RODRIGUEZ. Sir, again, I will try to do this briefly. I think what I reflected earlier about having a great deal of respect for a father who respected the law, and demanded accountability of our entire family, and I can tell you, with four brothers and a sister, a police officer never showed up at our door because of the respect we had for one another.

Because of his presence in South Jersey as one of the first Hispanics, and my mother, the communities did have a tendency to come to them, and ask for advice. What he said to me at that time was that the strength of that community would be to the extent that we demonstrated that we respected the law, whether we agreed with it or not.

Because I am a person in that State, that absolutely I will never show any defiance, because that defiance can be too disruptive to people who have looked to me. Throughout my entire career I have attempted at all times to be as responsive as I could to the disadvantaged. Not to take them to places where my whim would suggest, but to be sure that the law was honored, and they respected it.

So, again, I say when you look back at my career, look to see what I have done, and show me one occasion where it was not that I was showing respect for a law, whether you agreed with it or not, because my oath was to be sure that their rights were protected by the established law.

Many have disagreed with some of my actions, but I again say, sitting here today, that I do not at any time have to bow my head for one second in suggesting that I did not follow exactly what it was that I learned as a child, and that is why I simply say all I can do is if anyone raises an objection, look at the record.

I am not here simply to use words, or pablum, to try to gain acceptance. If I have not lived it, then I have not done it, and if I have lived it, I cannot deny it, and that is how I would have to respond to any criticism I receive.

Senator SIMON. I thank you.

Thank you very much, Mr. Rodriguez.

I have no further questions.

Senator HATCH. Thank you, Senator Simon.

Let me read a statement by Senator John East.

> DEAR MR. RODRIGUEZ: I welcome you to this confirmation hearing before the Committee on the Judiciary. I regret I could not be present to welcome you personally.

I just left the Security and Terrorism Subcommittee, where Senator East was, to come here myself.

> After your confirmation hearing before this committee during the closing months of the 98th Congress, concerned individuals in your home State of New Jersey contacted members of the committee to express their concern about what might be your judicial philosophy should you be confirmed by the Senate as a Federal judge.
>
> As a result, I joined Senators Denton and Hatch in addressing a series of legal questions to you. I emphasize that these were legal questions, not questions in any sense aimed at eliciting your private, moral or religious views.

I agree with that.

> I regret that the meaning of some of these questions has been misrepresented by some commentators in the media. You now have responded to these wholly legitimate written questions. I commend you for the forthright manner in which you have done so.
>
> As one member of the Judiciary Committee, I find your answers go a long way towards alleviating my concerns about your judicial philosophy. I look forward to studying the transcript of this hearing, and to receiving a briefing by the attorneys on my staff who are attending it, and I hope to be able to support your confirmation when the committee considers it in Executive Session on April 25th.
>
> I wish you the best of luck.
>
> Thank you, Mr. Chairman.

Mr. RODRIGUEZ. Thank you.

Senator HATCH. Again, I want to congratulate you for being here. In instances such as this where some serious questions did arise after the first hearing, it was important to have you return.

I believe that any Senator here has a legitimate right to ask any question regarding the law. It is about as high a duty as exists for a Senator under the Constitution. Our duty not only as individual Senators, to confirm judges of this land, Federal judges, but as members of this committee is to inquire, to ask the appropriate questions, and to do everything we can to make sure that we have the best judiciary we can get in this country. We need a judiciary which will be the fairest and most honorable in serving the people of this country. You will not only be a district judge in New Jersey, but you will also be serving everybody in this country, in a very real sense of that term. That makes this process very important.

So anybody who does not understand that process, does not understand the significance of this aspect of the Constitution.

As I mentioned earlier, I lived through the 4 years under the Carter Administration, where if a candidate for judge did not answer all questions right, by that I mean the way the ideologues wanted them answered—and I might add I disagreed with the ideologues—that candidate did not make it through the process. It was that simple. No matter what your qualifications were; no matter how good you were.

I did not hear a great hue and cry about it then, despite the notoreity of that screening technique. I can name a number of top Democratic candidates for judge, who did not even have a chance because they did not meet the idealogical concerns on one special issue of those who were interrogating.

I just want to commend you, commend your family. We are sorry you had to go through this, but it has been helpful to me to be here today, and your answers to those questions have also been helpful to me as a member of this very important committee, and as chairman of the Constitution Subcommittee, and as one who worries a great deal about who we are going to put on the benches in this country.

These are among the most important positions in this country, because you are going to be deciding cases for your lifetime. Therefore it is important to discuss your legal background and abilities and thinking, whether Senator Metzenbaum agrees or disagrees, or whether I agree or disagree with that thinking. It is important to know for our own satisfaction what your feelings, or what your beliefs are with regard to the law, and not particularly your personal beliefs, or moral beliefs, or religious beliefs, but your knowledge of the law, and your concern about the law, and your treatment of the law.

I think you have represented yourself very, very well, both in your written responses, and in your oral responses today.

So I want to commend you for appearing before the committee, and commend you for being here, and proceed with the rest of the hearing.

Thank you so much for being with us.

Mr. RODRIGUEZ. Thank you, Senator Hatch and Senator Simon. Thank you very much.

Senator Hatch. We have three more witnesses. We are going to have to limit them to just a few minutes apiece. I would like them to summarize.

We will call the Hon. John H. Dorsey, State senator from the State of New Jersey; the Hon. Gerald Cardinale, State senator from the State of New Jersey; and Mr. Joseph Pecoraro from Mendham, NJ.

So if we can have you gentlemen participate, we would appreciate it if we could swear you all in.

Do you solemnly swear that the testimony you are about to give before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Dorsey. I do.

Mr. Cardinale. I do.

Mr. Pecoraro. I do.

Senator Hatch. We will begin with Senator Dorsey.

Senator, I know that you would like to have more time, but I would appreciate it if you could really summarize in just a few minutes, because I have to be gone in just a few minutes, and we will put your complete statement in the record as though delivered.

TESTIMONY OF HON. JOHN H. DORSEY, A STATE SENATOR FROM THE STATE OF NEW JERSEY, A MEMBER OF THE STATE SENATE JUDICIARY COMMITTEE, 25TH DISTRICT, MOUNTAIN LAKES, NJ

Mr. Dorsey. Thank you very much, Senator Hatch.

It is a privilege to appear here today. Of course, it is a difficult one for us, since we disagree with the U.S. Senators and the Governor from our own State.

I am, as you mentioned, a State senator. I sit on the State senate judiciary committee, and I am a practicing attorney and I have, over the last 3 years, had contact with Mr. Rodriguez in his position as public defender and public advocate of the State of New Jersey.

In this connection, and I will read quickly, in this connection I would note one example relative to Mr. Rodriguez, which I find disheartening as a legislator, because it demonstrates the situation in which legitimate legislative acts are attacked and/or overturned by appointed officials.

In New Jersey, the reenactment of the death penalty has taken over 10 years. Sponsored by a Democratic State senator, it was vetoed by a Democratic Governor, on at least two occasions, and finally enacted by Governor Kean.

Mr. Rodriguez, as a public defender, has now vigorously and resourcefully attacked that act of the legislature on a number of grounds in connection with the first two death penalty convictions rendered by juries in New Jersey.

While I am not in any way troubled by the points raised by Mr. Rodriguez as public defender in his briefs before the supreme court, copies of which have been furnished to your staff, in which he raises numerous points, I am deeply troubled, however, by his attack, which I assume represents his own views, and which clearly demonstrates a total lack of restraint by an appointed officer, to legislative acts, wherein he argues to the supreme court, and I quote from one of the headings of his brief, "This Court has a constitutional responsibility to invalidate legislation such as the death penalty which bears no rational relationship to any valid public purpose."

Clearly, the New Jersey Legislature, for example, by way of the acts of elected representatives, had on at least three occasions determined that the death penalty has a rational relationship to valid public purpose. This was a decision having been made by the elected representatives, that should not have been challenged. Mr. Rodriguez clearly could have taken that position. He has not, and has challenged the people of the State of New Jersey, by challenging the acts of their elected representatives.

I would like to turn now to a second issue in which Mr. Rodriguez has involved himself deeply, and that is *Mount Laurel II*. *Mount Laurel II* is a household word in New Jersey.

Fortunately, it does not exist in any other State. While, New Jersey, until *Mount Laurel II*, was a very strong home rule State, wherein each municipality in the State under existing statutes was permitted to control its own land use or zoning. No particular uses were mandated, except, of course, that land could not be zoned into inutility and preexisting uses were "grandfathered." The New Jersey Supreme Sourt's decision in *Mount Laurel II* radically changed all of this.

Briefly, the court held that low- and moderate-income persons had a constitutional right to housing in all municipalities. In addition, the court created as a "Builder's Remedy," whereby any land owner or developer or builder who agreed to build Mount Laurel housing would be given zoning of his lands, which would make the process a profitable one, if not a very profitable one.

I must emphasize that there is no statute in New Jersey that authorizes any of the above. It is the creation of the supreme court.

Governor Thomas Kean of New Jersey described *Mount Laurel* in 1984 as follows:

"*Mount Laurel II* has opened the doors for 'wholesale revision of local zoning ordinances by the judiciary.' "

The Governor concluded by stating, and I am skipping through it, "I do not believe that every municipality has got to be a carbon copy of another. That is a socialistic country, a Communist country, a dictatorship."

At the time that Mr. Rodriguez was nominated in 1982, a predecessor to *Mount Laurel II*, referred to as *Mount Laurel I*, had been the law for 5 years. The *Mount Laurel* cases, which represent a refinement or supplement of *Mount Laurel I*, were pending before the supreme court, and a suit brought by the public advocate against 27 municipalities within my county, was then pending, seeking to strike down the local zoning ordinance.

I wrote to Mr. Rodriguez on January 22, 1982, asking for his views on the pending suit, asking whether he would withdraw it, et cetera. Mr. Rodriguez did not respond to my letter, in any way.

Mr. Rodriguez appeared before the Senate Judiciary Committee on February 2, 1982. When pressed for his views on the particular case, and what he would do with it as one of the plaintiffs, because the public advocate was a plaintiff, as well as the attorney for certain other plaintiffs in the case, he avoided giving a responsive answer to that question.

Today, from the back of the room, I believe I understood him to say he said he would abide by the decisions of the supreme court, but I do not find that in the confirmation hearings before the senate, the New Jersey Senate Judiciary Committee.

However, on or about April 13, 1983, in a speech before Employers Legislative Committee, in Morris County, 2 months after his nomination was confirmed, he made clear his views on the *Mount Laurel* issue. He adopted the concepts of *Mount Laurel I,* and made it clear to at least some present, that he intended to pursue the very law he, at the time of his confirmation, refused to express a view about, relative to his intentions.

Indeed, as far as I am concerned, Mr. Rodriguez always knew what his intentions were, and made no attempt to be candid or explicit about them when questioned at the time of his senate confirmation in New Jersey. He clearly could have, and I believe should have, advised the Senate Judiciary Committee of his endorsement of the concepts contained in *Mount Laurel II,* and his intentions.

At the time of the confirmation hearing, another senator, Senator James Vreeland, expressed his disappointment that the public advocate had "picked on Morris: without any prior discussion or negotiations with the municipalities sued. When asked what his approach would be, Mr. Rodriguez responded, and I quote, "my philosophy has always been to try to negotiate and discuss first."

A very acceptable answer, as you can understand, to the senators questioning him.

When the Morris County 27 suit stay was lifted by the court, a year later, Mr. Rodriguez did not discuss or negotiate as one of the plaintiffs or as the attorney for the other plaintiffs, what action would be taken by himself with the defendant municipalities, but simply proceeded with the suit.

As a matter of fact, Mr. Rodriguez, as public advocate, forwarded dismissals to a number of municipalities, without even telling them in advance of his action, and prior to their reading of it in the press.

Subsequently, when asked on what basis he dismissed some defendants, and not others, when all were originally joined at the time on the same basis, Mr. Rodriguez never answered in a substantive manner as to how he differentiated, and only responded that that was his right to conduct the litigation in any manner he saw fit.

In the last 2 years, not withstanding the explicit condemnation of Mount Laurel litigation by Governor Kean, who appointed Mr. Rodriguez, and the fact that no statute has ever been adopted endorsing *Mount Laurel II,* Mr. Rodriguez has pursued it zealously as a self-appointed social engineer.

The implication of that decision is that the public advocate's office has either instituted, continued, or joined in suits involving nearly 100 municipalities in New Jersey, seeking to eliminate home rule and local zoning ordinances in order to effectuate the builder's remedy. This litigation has presented the peculiar spectacle of the State of New Jersey, through the office of the public advocate, joining with landowners and builders, whose motive is profit, attacking political subdivisions of the State. The public advocate has continued in these actions, even where there clearly was a private entity to carry the lawsuit forward.

I will offer but one example as to how these suits have worked. The example is the place of residence of your colleague, Senator Bradley, of Denville Township, New Jersey. Mr. Rodriguez's office pressed the suit as public advocate, notwithstanding that a private corporation, and another private landowner had instituted Mount Laurel actions against Denville and extraordinary facts about the corporation, for example, Affordable Living Corp.

The attorney representing Affordable Living Corp. was Arthur Penn, Esquire, with offices at Montclair, NJ. Mr. Penn formerly held the position of assistant commissioner, director of public interest advocacy within the Department of the Public Advocate. Mr. Penn had been involved in the original Morris County 27 suits, which involved Denville, and still has a minor connection with the Department's Division of rate counsel.

The initial board of directors of Affordable Living was composed of one Carl S. Bisgaier. Up until 1½ years before, Mr. Bisgaier had been an attorney in the office of public interest advocacy of the department of the public advocate. Mr. Bisgaier had been involved in the Morris County 27, Mount Laurel suits which included Denville in connection with pretrial discovery.

The initial board of directors of Affordable Living Corp. also included Mr. Peter L. Abeles. Mr. Abeles is a planner in the suit between the public advocate and Denville. A member of Mr. Abeles' firm, a Mr. Wiener, was retained by the public advocate, and became the principal planning witness for the *Public Advocate* against *the Township*. Mr. Wiener's testimony was critical to the eventual outcome of the suit.

All of these individuals had gained knowledge of *Mount Laurel*, and of the defendant municipality through the public advocate's office, and certainly had knowledge as to the public advocate's trial techniques.

The township offered settlement proposals. The offers were rejected by the public advocate, or at least not accepted. The case then proceeded to trial, ending in a judgment against the township, to provide 833 low and moderate income units. This judgment, if and when combined with the builder's remedy, would mean that the township would now have to zone to permit approximately 4,200 residential units to be built at a density of between 12 and 15 units per acre, or more residences than now exist in a community that is very substantially developed.

Furthermore, members of Mr. Rodriguez's staff have argued before Senate committees during the past year and a half in favor of legislation that would adopt *Mount Laurel* as a legislative concept, which has not become State statute.

There is a great deal more to be said about Mr. Rodriguez, but I will not continue. It is my understanding, and I accept that he is a skilled litigator in the field that he has practiced law in in the past, but it is my opinion that in his position as public advocate and public defender he has demonstrated a lack of respect or restraint wherein acts of the elected legislature were confronted, his zealous appetite to pursue his beliefs without a sense of balance, without restraint and, therefore, it is inconceivable to me that Mr. Rodriguez as a judge could effectuate a frame of mind, a mental attitude of fairness and impartiality as required of a judge, but rather would seek to utilize his judicial position, as he has past positions, to effect his social and philosophical views. Thank you.

[The statement follows:]

NEW JERSEY SENATE

JOHN H. DORSEY
ASSISTANT MINORITY LEADER
SENATOR 25TH DISTRICT
355 ROUTE 40
MOUNTAIN LAKES, NEW JERSEY 07046
201-627-7800

STATEMENT TO U.S. SENATE JUDICIARY COMMITTEE JUDICIAL APPOINTMENT OF JOSEPH RODRIGUEZ

Mr. Chairman and Members of the Committee

I am John H. Dorsey, a State Senator from Morris County, New Jersey, a member of the State Senate Judiciary Committee, and a practicing attorney. In all of those capacities, I have had dealings with Mr. Rodriguez, during the last three years from the time of his nominations to the two positions, presently held by him, namely, Public Advocate and Public Defender. Indeed I sat on the Senate Judiciary Committee which interviewed Mr. Rodriguez at the time he was nominated for those positions three years ago. It is from these experiences and the events thereafter, that I would like to draw upon to make some observations relative to Mr. Rodriguez.

A great deal has already been written and communicated in the media relative to Mr. Rodriguez's views on what are referred to as his personal philosophical and idealogical views on such issues as the death penalty, comparable worth and Mount Laurel II. These comments have in turn sparked a considerable debate in the press and indeed between yourselves as to the relevancy of a judicial appointee's views in a pluralistic society. This is, of course, an issue which each of you will decide, but I am at a loss to understand how such views by any nominee, who upon confirmation obtains tenure for life, are not relevant and critical. This is a view which appears supported by analysis of judicial appointments made by former Presidents. But whether or not such views are important in the philosophical sense, they certainly cannot be denied to be important, when held by a nominee who feels no restraint and has utilized his positions to forward his views, although the positions which he has held have been appointed rather than elected.

In this connection, I would note one example relative to Mr. Rodriguez, which I find disheartening as a Legislator, because it demonstrates the situation in which legitimate legislative acts are attached and/or overturned by appointed officials. In New Jersey the reenactment of the death penalty involved nearly 10 years of legislative debate. Sponsored by a Democratic State Senator it was vetoed by a Democratic Governor on at least two occasions and finally signed into law by a Republican Governor, Thomas Kean. Mr. Rodriguez, as Public Defender, has now vigorously and resourcefully attacked that act of the legislature on a number of grounds in connection with the first two death penalty convictions rendered by juries in New Jersey. I would note that under the New Jersey death penalty statute there are two jury trials, one to establish guilt of the crime and the second to establish penalty, so that the death penalty as a sentence is determined by a jury. While I am not in any way troubled by the points raised by Rodriguez, as Public Defender, in his briefs before the Supreme Court, copies of which have been furnished to your Staff, attacking the propriety of juror selection; the

Prosecutor's alleged refusal to provide complete discovery, etc. I am deeply troubled, however, by his attack, which I assume represents his own views, and which clearly demonstrates a total lack of restraint by an appointed officer as to legislative acts wherein, he argues to the Supreme Court, and I quote from one of the headings of his brief,

> "THIS COURT HAS A CONSTITUTIONAL RESPONSIBILITY TO INVALIDATE LEGISLATION SUCH AS THE DEATH PENALTY WHICH BEARS NO RATIONAL RELATIONSHIP TO ANY VALID PUBLIC PURPOSE"

Clearly the New Jersey legislature, i.e., by way of the acts of elected representatives, had on at least three occasions determined that the death penalty had a "Rational Relationship TO VALID Public Purpose". This was a decision having been made by the elected representatives, that should not have been challenged. Mr Rodriguez clearly could have taken that position; He has not and has challenged the people of the State of New Jersey by challenging the law as adopted by the elected representatives. (The Supreme Court has not rendered its decision in these cases.)

I would like to turn now to a second issue in which Mr. Rodriguez has involved himself deeply and that is Mount Laurel II. Mount Laurel II is a household word in New Jersey. Fortunately, it does not exist in any other State. While, New Jersey, until Mount Laurel II, was a very strong Home Rule State, wherein each municipality in the State under existing statutes was permitted to control its own land use or zoning. No particular uses were mandated except, of course, that land could not be zoned into inutility and pre-existing uses were "grandfathered". The New

Jersey Supreme Court's decision in Mount Laurel II radically changed all of this.

Briefly, the Court held that low and moderate income persons had a constitutional right to housing in all municipalities; that every municipality had an obligation to provide same; that the Courts would in essence determine quotas or allocations and if a municipality did not comply i.e., build the housing with its own funds there was created by the Court what is referred to as the "Builder's Remedy", whereby any land owner or developer or builder who agreed to build Mount Laurel housing would be given zoning of his lands which would make the process a profitable one if not a very profitable one.

I must emphasize that there is NO statute in New Jersey that authorizes any of the above. It is the creation of the Supreme Court.

Governor Thomas Kean of New Jersey described Mount Laurel in 1984 as follows:

> "Mount Laurel II has opened the doors for 'wholesale revision of local zoning ordinances by the judiciary'"
>
> "He called that prospect an 'undersirable intrusion on the home rule principle that has served our state well for many years'"
>
> ". . . . he favored a 'combined approach' that included revitalization of urban housing and construction of Mount Laurel II housing but not in all towns"
>
> The Governor concluded by stating, "I don't believe that every municipality has got to be a carbon copy of another." "That's a socialistic country, a communist country, a dictatorship".

At the time that Mr. Rodriguez was nominated in 1982, a predecessor to Mount Laurel II, referred to as Mount Laurel I had been the law for 5 years; the Mount Laurel II cases, which represent a refinement or supplement of Mount Laurel I were pending before the Supreme Court and a suit brought by the Public Advocate against 27 municipalities within my County was then pending seeking to strike down the local zoning ordinance.

I wrote to Mr. Rodriguez on January 22, 1982 asking for his views on the pending suit; asking whether he would withdraw it, etc.

Mr. Rodriguez did not respond to my letter in any way.

Mr. Rodriguez appeared before the Senate Judiciary Committee on February 2, 1982.

When pressed for his views on the particular case and what he would do with it as one of the plaintiffs, i.e., as the Public Advocate and/or the legal issues, he skillfully avoided a responsive answer on the basis that it might be a violation of his ethical obligation if he responded.

However, on or about April 13, 1982, in a speech before the Employers Legislative Committee, in Morris County, two months after his nomination was confirmed, he made clear his views on the Mount Laurel issue -- he adopted the concepts of Mount Laurel I and made it clear to at least some present that he intended to pursue the very law suit he, at the time of his confirmation, refused to express a view about relative to his intentions. Indeed, as far as I am concerned, Mr. Rodriguez always knew what his intentions were, and made no attempt to be candid or explicit about them when questioned at the time of his confirmation. He clearly could have, and I believe should have, advised the Senate Judiciary Committee of his endorsement of the concepts contained in Mount Laurel and his intentions.

At the time of the confirmation hearing, another Senator, (Senator James Vreeland) expressed his disappointment that the Public Advocate "had 'picked on Morris'" without any prior discussion or negotiations with the municipalities sued". When asked what his approach would be Mr. Rodriguez responded, and I quote,

> "my philosophy has always been to try to negotiate and discuss first." (Pg 4A Confirmation Hearing)

A very acceptable answer, as you can understand, to the Senators questioning him.

When the Morris County 27 suit Stay was lifted by the Court, a year later, Mr. Rodriguez did not discuss or negotiate as one of the plaintiffs or as the attorney for the other plaintiffs what action would be taken, by himself, with the defendant municipalities, but simply proceeded with the suit.

As a matter of fact, Mr. Rodriguez, as Public Advocate, forwarded dismissals to a number of municipalities, without even telling them in advance of his action, prior to their reading of it in the press. Subsequently, when asked on what basis he dismissed some defendants and not others, when all were originally joined at the same time on the same basis, Mr. Rodriguez, never answered in a substantive manner as to how he differentiated, and only responded that that was his right to conduct the litigation in any manner he saw fit.

In the last two years, not withstanding the explicit condemnation of Mount Laurel litigation by Governor Kean, who appointed Mr. Rodriguez, and the fact that no statute has ever been adopted endorsing Mount Laurel II, Mr. Rodriguez has pursued it zealously as a self-appointed Social Engineer.

The Public Advocate's office has either instituted, continued or joined in suits involving nearly 100 municipalities in New Jersey seeking to eliminate Home Rule and local zoning ordinances in order to effectuate the Builder's Remedy. This litigation has presented the peculiar spectacle of the State of New Jersey, through the office of the Public Advocate, joining with landowners and builders, whose motive is profit attacking political subdivisions of the State. The Public Advocate has continued in these actions even where there clearly was a private entity to carry the law suit forward.

I will offer but one example as to how these suits have worked. The example is the place of residence of your colleague Senator Bradley, of Denville Township, New Jersey.

Mr. Rodriguez's office pressed the suit as Public Advocate notwithstanding that a private corporation, and another private landowner had instituted Mount Laurel actions against Denville and extraordinary facts about the corporation, i.e., Affordable Living Corporation.

The attorney representing Affordable Living Corporation was Arthur Penn, Esq. with offices at Montclair, New Jersey. Mr. Penn formerly held the position of Assistant Commissioner, Director of Public Interest Advocacy within the Department of the Public Advocate. Mr. Penn had been involved in the original Morris County 27 suit which involved Denville, (169 N.J. Super. 403 (App. Div. 1979), and still has a minor connection with the Department's Division of Rate Counsel.

The initial Board of Directors of Affordable Living was composed of one Carl S. Bisgaier. Up until a year and one half before, Mr. Bisgaier, had been an attorney in the office of Public Interest Advocacy of the Department of the Public Advocate. Mr. Bisgaier had been involved in the Morris 27, Mount Laurel suit, which included Denville in connection with pretrial discovery.

The initial Board of Directors of Affordable Living Corporation also included Mr. Peter L. Abeles. Mr. Abeles, is a Planner in the suit between the Public Advocate and Denville. A member of Mr. Abeles' firm, a Mr. Wiener was retained by the Public Advocate and became the principal planning witness for the Public Advocate against the Township. Mr. Wiener's testimony was critical to the eventual outcome of the suit.

All of these individuals had gained knowledge of Mount Laurel and of the defendant, municipality through the Public Advocate's office and certainly had knowledge as to the Public Advocate's trial techniques.

The Township offered settlement proposals; the offers were rejected by the Public Advocate or at least not accepted; the case then proceeded to trial ending in a Judgment against the Township to provide 833 low and moderate income units. This judgment if and when combined with the Builder's Remedy would mean that the Township would now have to zone to permit approximately 4,200 residential units to be built at a density of between 12 and 15 units per acre or more residences than now exist in a community that is very substantially developed. It is in my humble opinion, madness.

Furthermore, members of Mr. Rodriguez's Staff have argued before Senate Committees during the last year and one half in favor of legislation that would adopt Mount Laurel as a legislative concept including the Builder's Remedy and served on an ad hoc Committee to draft the legislation.

There is a great deal more to be said about Mr. Rodriguez; it is my understanding that prior to his appointment as Public Advocate that he was a skilled litigator in the field of negligence and products liability; but it is my opinion that in his positions as Public Advocate and Public Defender he has demonstrated a lack of respect or restraint wherein acts of the elected legislature were confronted; a zealous aptitute to pursue his beliefs without a sense of balance, without restraint and, therefore, it is inconceivable to me, that Mr. Rodriguez as a Judge, could effectuate a frame of mind, a mental attitude of fairness and impartiality as required of a Judge, but rather would seek to utilize his judicial position, as he has past positions, to effect his social and philosophical agenda.

New Jersey Senate

John H. Dorsey
Assistant Minority Whip
Senator, 25th District
355 Route 46
Mountain Lakes, New Jersey 07046
201-627-7800

January 22, 1982

Joseph Rodriquez, Esq.
518 Market Street
Camden, New Jersey 08101

Re: Nomination to the Office of the Public Advocate
Morris County "27" Suit

Dear Mr. Rodriquez:

I wish to offer my congratulations on your nomination to the Office of the Public Advocate.

I assume that the Senate Judiciary Committee will commence the hearings on your nomination on February 2, 1982. As a member of that Committee and as a Legislator from Morris County, I wish to advise you that I feel bound to inquire of you at the time of the hearing what your position will be as to the continuation of the Morris County "27" suit by the Office of the Public Advocate. The case is at a point where the Public Advocate could withdraw from the action and have the suit dismissed.

This suit started over three years ago by your predecessor in the Office of the Public Advocate and has had a long, painful and very expensive history for the municipalities in Morris County.

I would be happy to discuss the background of this case with you prior to your interview and would also have you note that the Governor's Counsel formerly represented one of the defendant municipaliti in connection with this case for a period of three years.

I look forward to meeting you on the 2nd of February.

Sincerely yours,

JOHN H. DORSEY

JHD/bt
cc: Hon. Walter Foran

Senator HATCH. Thank you, sir.

Senator Cardinale, we will turn to you. I am pronouncing your name right? Cardinale?

TESTIMONY OF HON. GERALD CARDINALE, A STATE SENATOR FROM THE STATE OF NEW JERSEY

Mr. CARDINALE. You are, Senator Hatch, and I compliment you for your use of pronunciation.

Senator HATCH. You are the first one ever to do that.

Mr. CARDINALE. I have to thank you for the opportunity to testify, and I will summarize as I proceed.

I share some of your feelings, I am sure. In a small way I face an analogous responsibility as a New Jersey senator, and I must admit to you without further delay, when I reviewed Joseph Rodriguez's nomination for the position of public advocate in New Jersey I voted yes, without any reservation whatsoever. Today I have changed my mind.

I was misled 3 years ago by an over-reliance on the impression Mr. Rodriguez made as he testified at his confirmation hearing, by perhaps weighing too heavily the fact that he had broken ranks with his own political party and had then supported the same gubernatorial candidate I was supporting. I suffered from a mistaken notion that he was one who would be tough on crime and criminals.

The past 3 years have taught me and some others in New Jersey that we should scrutinize more carefully the nominees whom we would grant wide discretionary powers.

He has not simply exhibited an adherence to personal values with which I disagree. It is his official actions with respect to staffing and employment policies, with respect to criminal sentencing, with respect to Federal efforts to curtail spending, with respect to the rights of the people of our State to vote on major public policy questions which arouse my concern.

He has used his considerable legal skill, and used his office to pursue his personal agenda, despite the clear will of the people and their elected representatives to the contrary in several cases.

It is this use of public office to pursue a personal agenda, instead of the broad public interest, to which I object. It is the likelihood of his continuing on a similar path as a judge that I fear will preclude his discharge of judicial responsibility in an impartial, unbiased fashion. In short, it is not that he is too liberal, which is what has been reported in the press, but that he has exhibited particular bias.

"Judges have imposed their personal values and policy preferences on the Nation." Those are the words of Richard Posner, who was appointed to the U.S. Court of Appeals in 1981. Mr. Posner is a lawyer, a judge, and a professor of law. He tells us that, "Many judges believe that things have gotten out of hand."

The members of this committee know that. You also know that many who were not lawyers, not judges and not law professors, agree with that analysis.

In my opinion, Mr. Rodriguez is entitled to any and all personal views he would prefer to hold. My objection is that he has used the office of public advocate and public defender to advance a number of policies with which the public in New Jersey is distressed.

I am going to give you some examples. It has become routine in New Jersey that Mr. Rodriguez was able to achieve noncustodial or ludicrously lenient sentences on behalf of those convicted of violent crimes. This is despite the comprehensive criminal sentencing provisions of the New Jersey statutes. He was somewhat rebuffed in February 1984 by a series of Supreme Court decisions. However, he continues to seek those same lenient sentencings, filing similar briefs, as if these decisions had not occurred.

In fact, he defends 80 percent of the criminal cases in the State of New Jersey.

Senator HATCH. But, Senator, that worries me a little bit. I am pretty tough on crime, but if I was a public defender, I would be doing everything I could, within the framework of the law, to try to resolve problems for defendants, and that is all he was trying to do.

Mr. CARDINALE. The State of New Jersey provides public defenders for those who are indigent. In determining who is indigent there are standards used which have been objected to by many.

I can tell you of one case which I chose, for many reasons, not to use as an example. It was quite celebrated in New Jersey some years ago, where the defendant had assets of $100,000, and was yet provided with a public defender in a rape case, the rape of a child. That is not uncommon. It is a complaint that we received.

Senator HATCH. You are saying that is Mr. Rodriguez's fault?

Mr. CARDINALE. It is his policy within his department, that they accept cases of indigents who, in the view of many people, really are not indigent.

I would go on and tell you that he has spent millions of dollars to overturn the death penalty in New Jersey, not merely to defend individuals, but to overturn the principle of the death penalty. The briefs he has filed in these cases are briefs aimed at reversing the legislation which was passed by an overwhelming vote in the legislature.

Senator HATCH. I respect you people for coming in and testifying. It is not easy to do so. I think anybody who does so deserves a commendation, not criticism.

But I have to admit he has been very clear that he personally opposes the death penalty, but will enforce the law.

Now, as a public defender who personally opposes the death penalty, I see nothing wrong with him working to try to overcome the death penalty. But there is one thing about your statement that I have not read before, but I have read since, that does bother me. I did not read it before I came to this hearing, and that is this.

If I can just quote it for you:

> I have provided the Committee with an account of the arrest of one of Mr. Rodriguez' aides. That aide has been charged with conspiring to free a 1981 Brinks' armored car robber from jail, not through legal means, but by force and violence. The FBI seized dynamite, sawed off shotguns, Uzi submachine guns and other illegal items in that raid. Some 50 or more criminal counts are now scheduled for trial in that case later this month, but the aide continues to be carried as a State employee, although no checks have been issued since shortly after the raid.

Then you say, and this may be serious, or it may not, I do not know:

I had hoped to share with you some detailed briefs on at least one or two cases which are referred to in the public advocate's reports which I submitted earlier. These are cases in which he sought to overtern Federal initiatives which sought to cut back on certain human service expenditures. Although we were promised these briefs by Monday, we were informed just yesterday that Governor Kean's office had issued orders that the briefs could only be released through the Governor's office. Our staff was unsuccessful in their efforts to make contact with the Governor's counsel to secure this information. I suspect that if the committee desires this information a direct request to the Governor may expedite the release of these public documents.

That does bother me, if you have requested information you think in the final determination of this we ought to have as part of our record here. I still may disagree with you with regard to the information, but until I see it I am not sure.

As tough as I am on crime, and as conservative as my feelings are, I can understand why a public defender would be doing everything he could for his clients, including trying to save them from the death penalty. I can understand even though I believe in the death penalty, you see.

Nonetheless I think we ought to get from Governor Kean this information, so I am sure Senator Thurmond and I, as chairman of this hearing, will directly request those from Governor Kean in order to complete the record. There must be no question that we have looked at the whole record.

You have had the intestinal fortitude to be here, and to testify sincerely from your perspective and from your standpoint, and we owe you the dignity of acquiring those records, which I think we can get.

So, if counsel can get those as soon as possible, we would like to have them before the next markup, if we can. I do not know anybody on the committee who should disagree with that, since you have taken the time to testify. Your points, although I may disagree with them, are well taken.

Mr. CARDINALE. Let me conclude by saying thank you for the opportunity to testify.

[The statement follows:]

PREPARED STATEMENT OF GERALD CARDINALE

Thank you for the opportunity to testify today at this confirmation hearing. It's not an easy task which you face. I can sympathize with your predicament in having to vote on nominees about whom you have little, or no first hand knowledge, having to rely on the opinions and advice of others while attempting to evaluate and reconcile the divergent and sometimes contradictory information placed before you. Yet you have an awesome responsibility. Many nominees you review will receive lifetime tenure in positions of enormous effect, responsibility and power.

I know the feeling because, in a far smaller way, I am faced with an analogous responsibility as a New Jersey State senator.

Let me admit to you, without further delay, that when I reviewed Joseph Rodiguez nomination for the position of Public Advocate in New Jersey several years ago—I voted yes—without any reservation whatsoever. But today I am here to urge that you follow the opposite course.

I was misled 3 years ago by an over reliance on the impressions Mr. Rodriguez made as he testified at his comfirmation hearings, by perhaps weighing too heavily the fact that he had broken with his own political party, and then supported the same gubernatorial candidate I had supported. I also suffered from a mistaken notion that he was one who would be tough on crime and criminals.

It is not easy to admit that I was wrong in that vote, but the past 3 years have taught me and some others in New Jersey that we must scrutinize more carefully the nominees whom we would grant wide discretionary powers.

My objections to Mr. Rodriguez are not simply that he has exhibited an adherence to personal values with which I disagree. It is his official actions with respect to staffing and employment policies, with respect to criminal sentencing, with respect to Federal efforts to curtail spending, with respect to the rights of the people of our State to vote on major public policy questions which arouse my concern. The record clearly is there. He has used his considerable legal skill and has used his office to pursue his personal agenda despite the clear will of the people and their elected representatives to the contrary in certain cases.

It is this use of public office to pursue a personal agenda, instead of the broad public interest, to which I object. It is the likelihood of his continuing on a similar path as a judge that I fear will preclude his discharge of judicial responsibility in an impartial, unbiased fashion. In short its not that he is too liberal, he is just too biased.

"Judges have imposed their personal values and policy preferences on the Nation." Those are the words of Richard Posner who was appointed to the United States Court of Appeals in 1981. Mr. Posner, a lawyer, a judge, a professor of law tells us that "Many judges believe that things have gotten out of hand." Many who are not lawyers, not judges and not law professors agree with Mr. Posner's analysis. That too—is why I am here to testify today.

When nominees can be confirmed despite a clear record that indicates they have imposed their personal values through their previous appointed positions, we begin to see why people have become disillusioned with government.

In my opinion, Mr. Rodriguez is entitled to any and all personal views he would prefer to hold. My objection is that he has used the office of Public Advocate and Public Defender to advance a number of policies with which the public in New Jersey is distressed. He has sought to be a public master—not a public servant. Let me give you some examples: As Public Defender he has provided defense for accused who were well capable of providing their own counsel—the taxpayers paid the bill. His office in fact defends 80 percent of the criminal cases in New Jersey—its a big bill. His expenditures approximately equal that of the entire legislative branch.

It had become routine in New Jersey that Mr. Rodriguez was able to achieve noncustodial or ludicrously lenient sentences on behalf of those convicted of violent crimes. This despite the comprehensive criminal sentencing provisions of the New Jersey statutes. He was somewhat rebuffed in February 1984 by a series of Supreme Court decisions requiring that the penalties provided in our statutes since 1979 be followed. His department today, those decisions notwithstanding, continues to pursue similar lenient sentencing and is spending even more public money to those ends—despite our clear public policies.

He has used his office to spend millions of dollars to overturn the death penalty in New Jersey—not merely to defend individuals but to attack our newly passed statute which was overwhelmingly demanded by our constituents and overwhelmingly supported by the elected officials, including the same Governor who appointed Mr. Rodriguez.

I have provided the committee with an account of the arrest of one of Mr. Rodriguez's aides. That aide has been charged with conspiring to free a 1981 Brinks armored car robber from jail, not through legal means, but by force and violence. The FBI seized dynamite, sawed off shot guns, UZI submachine guns and other illegal items in that raid. Some fifty or more criminal counts are now scheduled for trial in that case later this month, but the aide continues to be carried as a State employee although no checks have been issued since shortly after the raid.

I had hoped to share with you some detailed briefs on at least one or two cases which are referred to in the Public Advocates reports which I submitted earlier. These are cases in which he sought to overturn Federal initiatives which sought to cut back on certain human service expenditures. Although we were promised these briefs by Monday, we were informed just yesterday that Governor Kean's office had issued orders that the briefs could only be released through the Governor's office, our staff was unsuccessful in their efforts to make contact with the Governor's counsel to secure this information. I suspect that if the committee desires this information, a direct request to the Governor may expedite the release of these public documents.

You have heard about Mt. Laurel already, I won't repeat. However, I serve on the New Jersey State Government Committee which developed a legislative package to cope with the chaos created by Mt. Laurel II. Among the items we considered was SCR-24, sponsored by Senator Dorsey. That measure would have placed a public question on the ballot so that the electorate could support or defeat the Mt. Laurel II principles. Mr. Rodriguez's office vehemently opposed posing any public ballot question on this issue. Mr. Rodriguez's policy does not include submitting his work effort for approval by the public in whose interest he claims to have labored.

Members of the Senate, you have been most generous with your attention and time in your attempt to act in the best interest of the people with respect to this nominee. Please continue that work in the same careful deliberate manner with which it has proceeded thus far. It is very important that you do so. The public interest requires that our judiciary be perceived as totally unbiased in its deliberations. To confirm a nominee who so clearly has pursued a particular agency of social policy, whether that policy be of the right or the left, will undermine the confidence which the people must have for our judicial system to function in their interest.

Thank you.

Senator HATCH. Let me note, Mr. Rodriguez, my staff has indicated that you had shaken your head "no" in response to some statements. Would you care to comment on these points?

You might also tell the committee of the status of Ms. Yvette Kelly, and what actions you took after learning that she was involved in criminal activity.

I remind you that you are still under oath, although I do not think that is necessary.

Mr. RODRIGUEZ. With an office of some 300 attorneys, and they work out of Newark, and my main office is Trenton, and that is 50, 60 miles away, when this case came to my attention, it took us, I would guess, about 48 hours to separate her from the payroll, because I wanted to check with Civil Service to be sure what my rights were.

Senator HATCH. You did separate her from the payroll?

Mr. RODRIGUEZ. She is separated from the payroll.

Senator HATCH. What does that mean?

Mr. RODRIGUEZ. She is suspended without pay, pending a determination of the case. When she made application to utilize vacation time, I denied that, and that is what was recommended by the Civil Service personnel officers, because it is not as easy as you think. You cannot simply, without a formal conviction, be throwing people off the payroll, but she was certainly separated.

With respect to the people that we represent that have money, since I came into the office, we filed liens, because we do not always have the wherewithal to investigate everyone's finances.

Senator HATCH. Sometimes you have to act fairly expeditiously, in every matter.

Mr. RODRIGUEZ. In every case a lien is filed, and if we find in the future the person is not indigent, we try to collect on the liens. We do that because we do not have the finances to explore everyone's finances.

Senator HATCH. Have you collected on those liens that were above the statutory minimum?

Mr. RODRIGUEZ. Yes; I think we exceeded over $100,000 last year, of collected liens.

Senator HATCH. We will keep the record open for you to submit additional information, if you have any, on this, but we are glad to have your additional knowledge here today.

Let us turn to Mr. Pecoraro. If you would, I have only about a minute and a half, or 2 minutes left.

TESTIMONY OF JOHN PECORARO, PRIVATE CITIZEN, 66 EAST MAIN STREET, MENDHAM, NJ

Mr. PECORARO. My whole statement is about a minute, but I will summarize.

Senator HATCH. Why do we not put your whole statement in the record, and then why do you not summarize. That will be fine.

Mr. PECORARO. I am John Pecoraro. I am an ordinary citizen, speaking to ordinary citizens back in New Jersey, and we feel we have been frightened and frustrated with what we have lived through these years with Joe Rodriguez as the public advocate, the tyranny of the judiciary.

There is no public outcry for such a ruling. There is no public advocacy for such a process, but the New Jersey Public Advocate's Office, through Joe Rodriguez, picked it up and turned it into a personal crusade. The only public advocacy is for its abolition.

Because of *Mount Laurel II* the citizens of New Jersey feel frustrated that they have lost, have indeed lost, control over the development of their local communities. Everywhere *Mount Laurel II* has been implemented, there have been demonstrations against it, and the citizens, we go to our elected officials, and we say how did you get us into this mess, and they say they never voted for it.

The executive branch is against it, and yet *Mount Laurel II* gets implemented. No wonder the ordinary citizens become frightened and frustrated.

We hope the public advocate, who is Joe Rodriguez, would come to an end. We are now confronted with the appointment of Joe Rodriguez as a Federal district court judge, a term for life. Based on his record, we feel what he has done over the past 4 years, what he said here, that he will use his position as a platform to legislate law.

We are against the confirmation of Joe Rodriguez, because we feel his confirmation will send the wrong message to the county, that social engineering and judicial activism is back in vogue.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF JOHN PECORARO

My name is John Pecoraro I live at 66 Main Street in Mendham, New Jersey. I am an ordinary citizen speaking to other ordinary citizens who have asked me to come here to tell you that we are frightened and frustrated. We have been confronted by a series of actions in which the Judicial Branch of government has legislated bad law. We are frightened and frustrated with the "tyranny of the Judiciary".

In New Jersey the courts forced a series of events resulting in the now famous (in New Jersey infamous) Mt. Laurel II, where local communities can be forced by the state to have massive increases to their population without consideration of existing facilities (sewage, water, schools, roadways and transportation) or the millions of dollars in an added tax burden this will create. There is no public outcry for such a ruling, there is no public advocacy for such a process. But, the N.J. Public Advocates office—through Joseph Rodriguez—picked it up and turned it into a personal crusade. The only public advocacy is for its abolition. Because of Mt. Laurel II the citizens of New Jersey feel frustrated that they have lost, have indeed lost, control over the development of their local communities. Every where Mt. Laurel II has been implemented results in public demonstrations against it.

The citizens, these ordinary citizens, go to their elected officials, who are supposed to make law, and ask "How did you get us into such a mess". Their response is "I didn't vote for it. I am even against it". Even the Executive Branch of N.J. government, our Governor Tom Kean is against Mt. Laurel II. Yet all seem powerless to stop its implementation. No wonder the ordinary people become frightened and frustrated.

How did we get here. A frustrating situation mandated by the N.J. courts expanded by an appointed official—Joe Rodriguez. The public has no say in what is happening to them. Our only hope was that his term as Public Advocate would come to an end.

We are now confronted with the appointment of Joe Rodriguez as a Federal District Court Judge—a term for life—and, based on his record, he will use this position as a platform to legislate law.

We want a district court judge who is there to protect the rights of individuals who have justified grievances.

We are against the confirmation of Joe Rodriguez because his confirmation will send the wrong message to the county that social engineering and judicial activism is back in vogue.

Senator HATCH. Let me ask this question.

Mr. Rodriguez stated he did not personally try any of the death penalty cases defended by his office, in which he had 300 people working with him.

Does that reduce any of your concerns about his suitability relative to capital punishment?

Mr. DORSEY. He may not have tried the cases. He may not personally have written the briefs. However, it is inconceivable to me that given his capability of his administration, that he did not know the avenues of attack which would be taken in that brief.

I certainly agree with you, that as a public defender, he should raise on appeal the issues, such as jury selection and disproportionate penalty. The disturbing part is not that. The disturbing part is, within the brief they argue that the death penalty has no rational relationship, which is a direct attack upon acts of the elected representatives.

Senator HATCH. The point I am making concerns the difference between the public defender office and the a public prosecutor office. My experience is that many public defenders are very much against the death penalty, rightly or wrongly. They advocate lots of nuances in death penalty cases, and attempt to distinguish State statutes. It is difficult for me to find fault with them as public defenders, even though I disagree with them and even though I feel deeply about the death penalty.

It is difficult for me to find fault with agressive advocacy. It is also hard to fault him when he is not the trial lawyer in the case. I suppose he could read every brief, and direct his employees, but you and I both know that even in the case of the death penalty there are lots of nuances that might give you a case to take up to the Supreme Court of New Jersey, and even the Supreme Court of the United States, which might overturn that particular aspect of the capital punishment.

So I do not want to find too much fault, but I do want to raise that concern.

Mr. DORSEY. I understand exactly what you are saying, Senator Hatch. I trust you understand that humbly, based upon my experiences with Mr. Rodriguez, there is no way I can be convinced that when appointed to the bench he will do as he has offered today to do. It is beyond my belief that when we get to those issues that are not black and white, the issues as to whether or not we are colorblind, or whether we are color conscious, the issues in which a judge gets to express his views, that they will not come through.

It has simply been my working, or work with him, or watching his office from the time he came before the Senate Judiciary Committee, and I voted for his confirmation, that his actions are dictated to a large extent by his own personal views, which he uses as a quest for social justice.

Senator HATCH. I understand he did state his duty for the State of New Jersey was vigorously to defend capital defendants, and even to advocate land use cases already initiated before he took office.

In your opinion, did he exceed the scope of adviser, or advocate and, last, but not least, do you know, any of you, know of any instance of unethical or unprofessional behavior?

Mr. DORSEY. I would say, based upon my examination of what he has done, his actions did not depict one who would restrain himself as a judge to be impartial. I did find myself taken aback when the township of Denville provided me with the information in connection with their case, which was taken to judgment in that case, where we had a corporation owning land, or owning an option on a piece of property, where that property owner joins in the suit with the public advocate, which is going forward, is represented by a former commissioner, assistant commissioner, and one of the initial board of directors of the corporation is a former trial attorney from the office, and so forth.

Mr. Rodriguez, when he was very concerned about ethics upon his confirmation, in not expressing his views on *Mount Laurel* was not concerned about those ethical considerations in that case, and that case ended up with the most horrendous judgment of all the Morris County 27 cases.

Senator HATCH. Let us turn to Senator Simon.

Senator Simon, I have to step into the other room for a moment. Could you keep going until I get back?

Senator SIMON. You bet. I am going to be about 5 minutes.

Senator HATCH. Thank you.

Senator SIMON [presiding]. May I ask the two State senators, have you opposed judicial nominations in the past?

Mr. DORSEY. There is a function in New Jersey in which a home county senator can block a nomination, and there is a process at which, at the confirmation hearings, judicial nominees can be cross examined, and one has the right to vote yes or no.

I have voted no on judicial nominations, and have disapproved a particular nomination.

Senator SIMON. So you have opposed one other nomination, is that correct?

Mr. DORSEY. I have voted against one appellate court justice, who was also opposed by Senator Cardinale, who was being appointed to another 10 year term.

Mr. CARDINALE. There must have been dozens, if not hundreds of judges who have come before us since I have been in office in the State of New Jersey. I have voted no on judicial appointments twice out of those hundreds. It is one of those cases, the same one that Senator Dorsey had reservations about, which was a celebrated case within New Jersey. The judge was confirmed, but the judge did receive a no vote from me, and one other has received a no vote from me.

Mr. DORSEY. It was actually a very interesting case. The judge was confirmed, but the decision, which was the focal point for the opposition, in which she had rendered an appellate division decision upholding on a very light sentence for a rapist, was eventually passed upon by the supreme court, and the entire sentencing process, which was a part of her judgment, was eventually reversed by the supreme court unanimously, with the chief justice stepping down.

Senator SIMON. I gather from your statements that neither of you is questioning the competence of Mr. Rodriguez.

Mr. DORSEY. As an attorney I would not question his competence as an attorney. I believe he was a skilled attorney in the field of negligence and malpractice, and things of that knowledge.

No, that is not what we are saying about Mr. Rodriguez.

Mr. CARDINALE. Senator Simon, I have, on the contrary, stated his competence in some of the correspondence which I have presented to the committee. We accept him as a competent person.

Senator SIMON. Is there any question in the minds of either of you on his basic integrity?

Mr. DORSEY. No; I do not believe so, as you use that term. The objection is simply based upon my observations, my contact with Mr. Rodriguez, through his nominations, and the subsequent events that simply leads me to the ultimate decision that he will, in fact, be a coauthor of the Constitution, as that term was used today, rather than simply an implementing force of that Constitution.

Mr. CARDINALE. I would have to say I am confused on that point, because I am a layman. I am not an attorney. As a layman, it seems to me that when one takes an oath of office, one should abide by certain strictures, and it seems to me that it is unethical.

Others may not consider that unethical, when one goes beyond the scope of that office, in the pursuit of policies.

The charge of the public advocate in New Jersey is a relatively narrow one. It has been defined in court decisions as being not one who seeks to change the law, and these are layman's terms, and I am not giving the court cite, but I believe it was in the *Mount Laurel II* decision itself.

But it is rather to operate in seeing to it that the laws are enforced. I believe in some of his actions, and not in all of them, and not in all that I object to, he has exceeded that bound.

To me, in my own personal evaluation, I would consider that unethical. Others would characterize it differently.

Senator SIMON. I thank you both for your answers. I think they do clarify the situation. There is no question about the competence of the nominee. There is some question in the mind of one of the witnesses about whether he goes beyond the bounds of where he should as a judge. But even that you are somewhat hesitant on.

I would simply add the basic opposition I sense from the three of you is the viewpoint of Mr. Rodriguez, and most of us in the Senate—I should not say most of us—most of us on this side of the aisle in the Judiciary Committee will be probably approving, during this 2-year period, 115 or 135 judges.

Probably 80 percent of them I would differ with on political philosophy, but that is not our function, to screen people on the basis of political philosophy.

But we appreciate your being here.

You came back just at the right time, Senator Hatch.

I thank the three of you for your testimony.

I thank you, Mr. Chairman.

Senator HATCH [presiding]. Thank you, Senator Simon. We appreciate your diligence.

I think it is a real tribute to you, as a new member of this committee, to spend this kind of time on judicial nominations. It is a hard thing to do. Afternoons are always clogged in the Senate. You have my respect in spite of your liberal ways.

Let me just say we appreciate you people coming in. As I said before, it is difficult to do this, but you feel deeply about it, and you are substantial people in your State.

I want to thank you, Mr. Rodriguez, for being here, and answering the questions as candidly as you have, for your willingness to go through this process. It is a great process. It is one I think has been time tested, and in the end one which will always be protective of our Nation and its values.

Mr. DORSEY. I just wanted to respond to what Senator Simon was saying, if I may.

I understand the position you are in, and having to approve individuals for the Federal bench, that are not of a like thinking of yours. I have no problem with that. I have no problem taking one position, and another person taking another position, or another legislator taking another position.

What my problem with Mr. Rodriguez rises out of is the fact that when taking his new position, which calls for impartiality, which calls for fairness, I cannot believe he will set aside his views, because of the zealousness with which he has pursued various items in his past positions with the State.

I have no problem in a pluralistic society with people having different views. I understand that. But this is a very sacred position, which is one that requires absolute fairness and impartiality.

Senator HATCH. Mr. Rodriguez, do you care to make any further statement here today? Do you feel that these are valid criticisms? I would like to have your viewpoint.

Mr. RODRIGUEZ. Senator, the only statement I would make is I think the outraged public of New Jersey should respond. I do not feel I want to.

Senator HATCH. As I understand your testimony, you are going to try to do this job to the best of your ability, as you have stated to this committee, in response to questions that were asked earlier today?

Mr. RODRIGUEZ. Yes, sir; as I have done in attempting to do no more than to follow the dictates of New Jersey in the *Mount Laurel II* case, which I did not start, which I settled 13 municipalities out, I started no new suits. We are down now to three. The 140 builders' remedies, I have nothing to do with them. They are builders that now have the economic incentive to bring the action, and there are three judges that have been designated by the Supreme Court to function with the *Mount Laurel II* decision.

Our office, and I made the public statement last year, has very little room in it now to do any more *Mount Laurel* work, because the play has been taken away by the builders, and that was my public statement 1 year ago, and that is exactly what has occurred.

Senator HATCH. Let me just say, in closing, that I have had the privilege of representing various criminal defendants through the years, and I have had to admit that nobody was more active than I was in trying to represent them, and to do it in every possible way I could. Despite my personal feelings, I had an ethical obligation as a lawyer, despite my differences with certain aspects of the law, I did my best within the framework of the ethical principles of the bar.

So I understand how people can differ with public defenders. I also understand how people differ with zealous prosecutors who are also just trying to do their job in many cases.

So with that, we are happy to close this hearing. I think it has cleared up a number of issues that were raised. We are pleased you people took the time to appear before the committee. We will obtain this additional information, if we can, from the Governor's office, and we will move from there.

So with that, we will recess until further notice.

[Whereupon, at 4:20 p.m., the committee adjourned.]

BIOGRAPHY

JOSEPH H. RODRIGUEZ

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Birth: December 12, 1930, Camden, NJ.

Legal residence: New Jersey.

Marital status: Married to Barbara Marriner, 4 children.

Education: 1949-50—Niagara University; 1952-55—LaSalle University, A.B. degree; 1955-58—Rutgers University, School of Law, LL.B. degree.

Bar: 1959—New Jersey.

Military service: 1950-52—U.S. Army.

Experience: 1957-82—Brown, Connery, Kulp & Wille; Law Clerk (1957-59); Associate (1959-69); Partner (1969-82). 1972-74—Chairman, State Board of Higher Education. 1974-79—Chairman, State Commission of Investigation. 1982-present—Public Advocate of New Jersey (Also Public Defender State of New Jersey).

CONFIRMATION HEARING ON:
SAM B. HALL, JR. AND KENNETH F. RIPPLE

WEDNESDAY, APRIL 24, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond, (chairman of the committee) presiding.

Also present: Senators McConnell and Simon.

Staff present: Duke Short, chief investigator; Joseph Kopka, investigator; Ruth Lucas, clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today to consider the nomination of Kenneth F. Ripple of Indiana to be U.S. circuit judge for the seventh circuit. Senator Quayle, I believe, is here.

Is Senator Lugar coming also?

Senator QUAYLE. I understand, Mr. Chairman, that——

The CHAIRMAN. We have a statement from him.

Senator QUAYLE [continuing]. Senator Lugar has a conflict, unfortunately, but I do believe he has a statement and I would ask at this time that that statement would be inserted in the record.

The CHAIRMAN. Without objection, on your motion the statement will be placed in the record endorsing the nominee.

[The statement follows:]

INTRODUCTION BY SENATOR RICHARD G. LUGAR TO THE SENATE JUDICIARY COMMITTEE OF KENNETH F. RIPPLE, NOMINEE TO THE U.S. COURT OF APPEALS, SEVENTH CIRCUIT, CHICAGO, IL

It is an honor and a privilege today to introduce to this distinguished committee, Kenneth F. Ripple, the nominee to the United States Court of Appeals, Seventh Circuit, in Chicago, Illinois.

Mr. Ripple's credentials as a scholar, author, teacher and practitioner of the legal process are truly astounding.

He received his baccalaureate from Fordham University. He later graduated from the University of Virginia with a bachelor of laws degree and then graduated summa cum laude from George Washington University with a master of laws degree.

While Mr. Ripple's academic career was truly outstanding, his professional accomplishments have likewise been remarkable.

He has taught with much distinction for the last seven years at the University of Notre Dame Law School, having been selected as the teacher of the year during four of the seven years at that fine institution.

Mr. Ripple earlier served for several years as special assistant to United States Supreme Court Justice Warren Burger and he continues to serve in the prestigious position of Reporter to the Advisory Committee on the Federal Appellate Rules and as a member of the Military Justice Act of 1983 Advisory Commission.

He has also found time to author numerous books and articles on the legal field.

Mr. Ripple's legal career has not been confined to the classroom and the library. In addition to his work for Chief Justice Burger, he had extensive practice experience in the late 1960s and early 1970s with the Judge Advocate General in the Department of the Navy.

He continues to appear on a regular basis before the United States Supreme Court and before other courts in appellate litigation.

Mr. Chairman, Mr. Ripple's professional accomplishments obviously speak for themselves. It is also important to note, though, that he is highly spoken of by persons with whom he has associated, both inside and outside of his professional status.

Mr. Chairman, it is my privilege to introduce him to the committee, and to urge your support for his appointment.

The Chairman. You may proceed, Senator.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator Quayle. Thank you, Mr. Chairman.

Today is a real pleasure and honor for me to appear before you to introduce what I think is an exceptional man from my home State of Indiana for the nomination of the Seventh Judicial Circuit of the U.S. Court of Appeals.

I have gotten to know Mr. Ripple over the years and particularly in the last few months. I can tell you, Mr. Chairman, and I know that you are interested in this, that he is first and foremost a very dedicated family man. I just had the pleasure of meeting his wife and his three children that are out here to witness this occasion.

Ken Ripple also exemplifies, Mr. Chairman, the finest qualities of our legal community. He has a remarkable record of service in the legal profession.

He began his career following graduation from the University of Virginia School of Law in 1968, during the next 4 years he served in the U.S. Navy in the Office of Judge Advocate General, beginning as appellate defense counsel and concluding as the branch head.

In this endeavor, as is true in most of what he has done, he distinguished himself. He was awarded the Navy commendation medal for professional excellence by the Secretary of Navy. He had a distinguished and great service in the Department, or with the Navy.

Following his term with the Navy, Ken Ripple was appointed by the U.S. Supreme Court to inaugurate the position of the legal officer in 1972. Again, he excelled and in 1973 was made special assistant to the Chief Justice for judicial matters. As senior attorney on the judicial staff of the Chief Justice, he had overall responsibility for the cases before the Supreme Court.

Since 1977 Ken Ripple has been a professor of law at the University of Notre Dame in Indiana, where he has taught courses in basic constitutional law, conflicts, and advocacy in a Supreme Court seminar. And during the past 8 years on the faculty of Notre Dame, I can assure you that he has once again excelled as his colleagues and students who have traveled from Indiana here today can certainly attest.

Mr. Chairman, I think I will just summarize briefly that I think and I hope and I am certain that you will find out that you have an outstanding excellent candidate. He is exceedingly well qualified. He has impeccable legal credentials. His integrity is beyond question. And I think that he would be a tremendous addition to the seventh judicial circuit, and I look forward to working with you and this committee in hopefully getting this nomination through, so we can get on with the appointment of a person that I think will make a tremendous contribution to that circuit and a tremendous contribution to the legal profession, and above all, a tremendous contribution to this Nation from its legal and constitutional responsibility in the judicial system that we are so proud of.

Mr. Chairman, I ask the unanimous consent that my entire statement here be inserted and made a part of the record.

The CHAIRMAN. Without objection, that will be done.

[The statement follows:]

PREPARED STATEMENT OF SENATOR DAN QUAYLE

Mr. Chairman, it is certainly a pleasure and an honor to appear before you today to introduce an exceptional man from my home state of Indiana for the 7th Judicial Circuit of the United States Court of Appeals. He is Kenneth F. Ripple of South Bend, Indiana. Ken exemplifies the finest qualities of the people of my state. Like myself, Ken Ripple is a family man with wife and three children. We both met our wives in school. I met my wife Marilyn while in Law School at Indiana University and Ken met his wife Mary in the third grade. Ken Ripple displays many of the characteristics of my Hoosier constituents. He has a strong work ethic and a dedication to the completion of a task. He is a man who is proud to serve his country and his countrymen. He has demonstrated a strong capacity to tackle the most difficult problems with every effort and without reservation. Ken is a very personable and friendly man who is easy to like.

Ken Ripple also exemplifies the finest qualities of our legal community. He has a remarkable record of service in the legal profession. Ken began his career following graduation from the University of Virginia School of Law in 1968. During the next four years he served in the United States Navy in the Office of the Judge Advocate General, beginning as an Appellate Defense Counsel concluding as the Branch Head. In this endeavor, as is true of most that Ken does, he distinguished himself. He was awarded the Navy Commendation Medal for professional excellence by the Secretary of the Navy. Throughout his tenure in the legal branch of the Navy Ken displayed concern for his fellow man and the institution in which he served. He was responsible for drafting the legislation on the problem of drug abuse in the Navy. He remains active in the service to the Navy where he trains the judge advocates assigned to Navy Appellate Review Activity and by producing tapes for the Judge Advocate General's School in Charlottesville, Virginia.

Following his term in the Navy Ken Ripple was appointed by the United States Supreme Court-to inaugurate the position of Legal Officer in 1972. Again he excelled and in 1973 was made the Special Assistant to the Chief Justice for Judicial matters. As the senior attorney on the judicial staff of the Chief Justice he had overall responsibility of the cases before the Supreme Court.

Since 1977 Ken Ripple has been a Professor of Law at the University of Notre Dame in Indiana, where he has taught courses in basic Constitutional Law, Conflicts, Advocacy and a Supreme Court Seminar. During the past 8 years on the faculty at Notre Dame Ken has once again excelled, as his colleagues and students who have traveled from Indiana here today will attest. Four times he was cited with the Distinguished Professor Award by the students and has received a commendation by the Black American Law Students Association at Notre Dame for his work with minority law students. Ken was elected to the American Law Institute, Phi Beta Kappa, and received the American Jurisprudence Prize.

Ken Ripple has served the legal community well during since his admission to the Bar. He has a long list of research and publications on a wide range of subjects. He has written numerous commentaries and reviews and lectured at various Universities and at professional forums. Ken has been an asset to every person and institution that he has served.

Beyond his educational, professional and academic qualifications Ken Ripple has the personal qualifications necessary to serve the Judicial community with distinction. Ken is first and foremost a lawyer. A lawyer who has served his country in the

Navy. A lawyer who has served his profession as a teacher. During his 13 year involvement in the academic area of our legal profession Ken has shown a strong interest and dedication to the Judiciary. To Ken Ripple this dedication to the judiciary has been a vocation. He has progressed throughout his career toward the judicial role in which he has now been nominated. Ken Ripple possesses all of the characteristics to assume the responsibilities of the Federal Court. I am confident that his future as a judge will be as remarkable as his achievements in his past.

Ken Ripple will be an important contribution to the Seventh Judicial Circuit of the United States Court of Appeals. He has the finest abilities and character that my state has to offer. As the elected representative of the five and one half million people in the State of Indiana, I present to you, Kenneth Ripple.

The CHAIRMAN. I want to congratulate you, Professor Ripple, upon your appointment by the President, and also congratulate you for having this distinguished Senator come here in your behalf, who is held in high esteem. I happen to serve with him on the Armed Services Committee, and he is doing a fine job there also.

And Senator Lugar, the senior Senator here, has endorsed you, and in a few minutes we will ask you a few questions.

We have got some other Members of the Senate and the House. If you will just step aside, we will hear them.

Senator Quayle, if you want to remain, feel free to do so. If you have to leave, I know how busy you are.

Senator QUAYLE. Thank you, Mr. Chairman.

The CHAIRMAN. Now we have Representative Sam Hall of Texas, to be United States district judge for the Eastern District of Texas.

Senator Bentsen is here, Senator Gramm is here, and a number of Congressmen.

We would be very pleased to hear from you gentlemen.

STATEMENT OF HON. LLOYD BENTSEN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator BENTSEN. Mr. Chairman, let me first congratulate my colleague, Senator Phil Gramm, on his choice and recommendation of our very distinguished friend, Sam Hall.

Congressman Sam Hall has been a friend of mine for many years. He has had an excellent record in the U.S. House of Representatives. He has served on the Judiciary Committee for his entire House tenure. I am certain you will see a very easy transition for this distinguished colleague of ours to the bench. I think it is a loss for the House, but I think it is a gain for the Judiciary. He follows in the tradition of his very distinguished father and uncle, who both served on the bench. His father served on the bench for over 20 years. He was a man known for his fairness, and for his evenhandedness. I think too that in the son of Sam Hall, Sr., you will see a man with equal intellectual capacity, a sound record of integrity and ethics, that I think will serve the public well on the Federal judiciary.

He is a graduate of Baylor University, an excellent family man, has his lovely wife Madeleine here today, and has three daughters who have been very supportive of him as he of them.

I am just delighted to join with Senator Phil Gramm, my colleague in the Senate and my colleagues from the House, who are here today in support of this nomination.

[Prepared statement follows:]

PREPARED STATEMENT BY SENATOR LLOYD BENTSEN

Mr. Chairman, I am here on behalf of my longtime friend, San Hall. I am pleased to support Congressman Sam Hall's nomination to the Federal Bench. I have known Sam for many years and throughout that time I have had the opportunity to observe his sound thinking, balanced judgment and wise decisionmaking. Congressman Sam Hall is no stranger to the members of the Senate Judiciary Committee. He has served as a member of the House Judiciary Committee since his first term 9 years ago. As such, many of you have also come to know and respect both the intellectual and academic influence exercised by Sam Hall on the House side.

Sam, like his dad and uncle, will carry on the proud Hall legacy of serving on the bench. Sam Hall, Sr., served as one of Texas' finest judges for more than 20 years. State District Judge Hall was repected throughout the State of Texas as an even-handed judge. If Sam's dad were here today, he would be proud of his son's nomination by the President of the United States to the Federal bench.

Sam's dad did get to see many of his son's accomplishments, including Sam's graduation from Baylor Law School. For 27 years, before Sam was elected to his first term in the U.S. House of Representatives, he practiced law in Marshall, Texas. During his tenure in the House of Representatives, he has served on the House Judiciary Committee and has been the chairman of the House Judiciary subcommittee on Administrative Law and Governmental Relations for the last 2 years.

Congressman Sam Hall will make the transition to Federal Judge Sam Hall smoothly and I'm sure that he will continue to address issues before the bench with the same clarity, ethics, and temperament that has made him my respected friend and colleague. Mr. Chairman, I join with others today in sounding a firm voice of support for this judicial nominee for the Eastern District of Texas. I would also like to extend my congratulations to Sam's wife, Madeleine, and their three daughters.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you, Senator.

Senator Gramm, we will be glad to hear from you.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **GRAMM**. Well, I am awfully honored to be here today with my senior Senator Lloyd Bentsen and with my friend Sam Hall, to speak on behalf of Sam's nomination to the Federal bench.

I have known Sam Hall for over a decade. I have served in the House with him for 6 years. I worked with him on many issues that were difficult, that required knowledge and understanding and courage, and I do not think it is an overstatement to say that Sam B. Hall, Jr., is the most respected Member of the United States Congress.

We have here today many of our colleagues from the House, Democrat and Republican alike.

Sam Hall practiced law for 28 years. He came to the Congress. He served as Chairman of the Judiciary Subcommittee on Administrative Law and Governmental Relations, and I doubt that this committee has had many men come before it for appointment to the Federal bench who where as well qualified, who had as broad a base of knowledge of the law and experience as Sam Hall.

But, Mr. Chairman, I think Sam Hall's qualifications go beyond that. He is a student of the Constitution. He believes in strict construction of the Constitution. Having served in Congress and believing in that strict construction of the Constitution, he believes that it is the duty of the Congress to make the laws and the duty of the judiciary to interpret the laws.

And as a father and a family man and citizen, he is concerned about the rights of the victims as well as the rights of those who violate the law.

I think a lot of Sam Hall and everybody who knows him does as well.

Sam Hall is the kind of man that you hope some day your son grows up to be and I am happy to be here to speak on his behalf for appointment to the Federal bench.

The CHAIRMAN. Thank you very much, Senator.

Congressman Hall, I want to congratulate you on your appointment by the President, also for these very laudatory remarks made by these esteemed Senators, Senator Bentsen and Senator Gramm, both of whom are held in high respect here in the Senate.

Now, these Senators are very busy, I am sure the House Members are too. You gentlemen feel free to leave if you want to, you Senators, or you can remain.

Congressman Hall, I see about half the Members of the House over here to speak on your behalf. Would you care to introduce any of them? Or are they here just to show their presence, or do they want to say a word? If they do want to say something, we will try to hear from each one of them.

STATEMENT OF HON. SAM B. HALL, JR., OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Mr. HALL. Senator, I want to thank both of these distinguished gentlemen who flank me at this table for the kind remarks they have said.

I looked around to see if they were really talking about me or someone else. [Laughter.]

Senator Bentsen leaned over and said, "This is probably the high point of your judiciary career at this minute." So I do appreciate more than they know. They are distinguished people, they are dear friends of mine, and I will never do anything to let them down.

I do have with me today, if I may introduce these people, Senator—of course, I have my wife Madeleine.

Honey, if you would stand.

The CHAIRMAN. We are glad to have you, Mrs. Hall.

Mr. HALL. And I think we have———

The CHAIRMAN. Do you have any other members of your family with you that you want to introduce?

Mr. HALL. No, sir, that is the only member of the family here.

The CHAIRMAN. All right, well, go ahead and introduce any friends or Congressmen.

Mr. HALL. Jake Pickle of Texas, Sonny Montgomery of Mississippi, Ron Mazzoli of Kentucky, Marilyn Lloyd of Tennessee, Tom Kindness of Ohio, Charlie Stenholm of Texas; Mickey Leland of Texas; Ron Coleman, Solomon Ortiz, Kika de la Garza, all of Texas; my friend Ralph Hall of Texas, Jack Fields of Texas, Tom DeLay of Texas, Steve Bartlett of Texas, Ike Skelton of Missouri; Albert Bustamante, Tom Loeffler, all of Texas; Dick Armey of Texas, Bill Hughes from the State of New Jersey, and Larry Combest of Texas.

And I appreciate more than those people know their being here today.

The CHAIRMAN. This is certainly a fine endorsement for these gentlemen, as busy as they are, to take time to come over here and be present for your hearing, and to back you up as they are doing.

Did you want any of them to talk or have one spokesman for all of them?

Mr. **Hall**. Senator, I am afraid to ask. That is up to them. [Laughter.]

The **Chairman**. I understand Congressman Rodino wanted to be here, too, but could not make it.

At any rate, they are all strongly for you, I would assume from their presence?

Mr. **Hall**. I would hope so, yes.

The **Chairman**. If any of you are not for him, raise your hand. [Laughter.]

The **Chairman**. I do not see any hands going up. They must be all for you.

Well, that is fine.

We will now revert to the first nominee and any of you Congressmen who came and endorsed Congressman Hall, we thank you, and you can remain, of course, if you want to, or—I know how busy you are, if you have to return, we will understand.

Mr. **Hall**. Mr. Chairman, Congresswoman Marilyn Lloyd would like to have a statement put in the record.

The **Chairman**. Without objection that will be admitted.

[The statement follows:]

Prepared Statement of Congresswoman Marilyn Lloyd

Mr. Chairman, my dear friend and colleague, Sam Hall, has been honored with the nomination of federal judge for the East Texas District. He is a man of many talents and I can think of no one more qualified to serve in that capacity.

Like so many young men of his generation, Sam's college years were interrupted by military service. But after completing law school in 1948, Sam began a distinguished career in his home town of Marshall, Texas and went on to become one of its most outstanding citizens. Displaying the deep respect for the law which has earned him such respect in this chamber, Sam became active in local and state government. Then, as now, he saw a duty to serve and to every task he has so willingly undertaken for his nation, he has brought a determination to be fair. Certainly, that is a requirement for anyone sitting on the bench and it occurs to me that it comes from his broad background.

In order to be fair, like Solomon, you must be wise. And while wisdom is a gift it can also be acquired through participation in human experiences. Through his involvement on the board of education of the Marshall Independent School District, with the Chamber of Commerce and Kiwanis International, and with many other organizations not the least of which is the Congress of the United States, he has acquired an understanding of the nature of man. For that reason, I believe he will be a credit to the judicial system and the laws of this land which he holds so dear.

Sam has been an honorable member of this body and we will be the lesser for his leaving. As a member of the Judiciary Committee he has provided council to many of us who lack his expertise. And he is a deeply religious man. I will miss his counsel. Sam Hall stands firm in his convictions regardless of political stance and consistently votes his convictions. I trust the Senate will approve his nomination quickly and want to wish him and his wife Madeleine well in their coming responsibilities.

Mr. **Mazzoli**. Mr. Chairman, I have a short statement for Sam. Would that be OK?

The **Chairman**. Without objection, we will admit your statement.

[The statement follows:]

Prepared Statement of Congressman Romano L. Mazzoli

I have served with Sam B. Hall, Jr., since 1976 on the House Judiciary Committee. I have sat next to him most of that time. And I feel I know him well as a person and as a lawyer.

Sam will make an excellent Federal district judge. And, I urge his swift confirmation by the U.S. Senate for the following reasons, which I wlll state briefly because of time constraints.

Sam has a strong personal, political and legal philosophy. Now, I happen to share many of Sam's views. But, even when we differ—as we do on the pending immigration bill—Sam has always cooperated with me, as Chairman, and with the subcommittee members and staff. He always abides by the majority opinion even when it may be against his personal view.

Sam supports the legislative process. He will support the judicial process and procedure. That is his style, and that is the admirable trait he will bring to his deliberations on the bench.

Sam is a very talented questioner—a perceptive searcher after the facts. This talent—sharpened and honed during the 30-plus years Sam practiced law in Marshall, TX, his home town—will stand him in good stead on the bench, especially on the trial bench.

Sam is a man of considerable means—financial as well as intellectual.

The former will help him handle the financial strains and straits which confront Federal Jurists and which have driven some to leave the bench for the more generous renumeration of the private practice of law.

And the latter—his considerable intellect--which has made him a "quick study," as we say on the Hill—will aid him in mastering the arcane details of his cases swiftly and smoothly. This is an absolute requirement if the Federal judicial system is to administer justice fairly and promptly in the challenging years ahead.

Sam, too, is a nice fellow, easy to make friends with and easy to work with.

He and I have sat side by side for the past 4 years. We are now in our 5th year together as chairman and ranking Democrat on the House Immigration Subcommittee. We flew together from Bangkok back to the United States—some 20 hours in the air—back in 1981. I have told Madeleine, Sam's wife (facetiously I must add), that I probably know as much about Sam as, Madeleine does because of that long trip.

I realize that the Federal bench is not a personality contest. But I submit that there is a need for good working relationships among and between Federal judges just as there is among Members of Congress if the work is to be done. Sam will be a well-liked and productive judge as he has been well-liked and productive Member of Congress.

Lastly, Sam is blessed with a wonderful and loving wife and a wonderful and loving family.

Because of Sam's excellent roots—excellent genes—excellent bloodlines—he will serve competently, with distinction, and for a full measure of years on the bench.

I urge this distinguished panel to recommend to the full Senate that Sam B. Hall, Jr., be confirmed as a Federal judge.

STATEMENT OF HON. ROMANO L. MAZZOLI, A MEMBER OF THE HOUSE OF REPRESENTATIVES FROM THE STATE OF KENTUCKY

Mr. MAZZOLI. Mr. Chairman, I hope I am not presumptuous in asking to speak, though I have not been scheduled as a witness. And while I was here, really, because of Sam Hall, I notice my friend Ken Ripple, who is also before you as a nominee and my friend and colleague from Kentucky, Senator McConnell.

If I might presume upon your time for a minute, Mr. Chairman, I would appreciate speaking on behalf of Mr. Ripple.

The CHAIRMAN. Go right ahead.

Mr. MAZZOLI. I have known Ken for several years, and it stems from my love for my alma mater, the University of Notre Dame. I am a graduate of the school, though not of its law school.

As a member of Notre Dame's Alumni Board, I came in contact with the dean of the law school, Dean Link, and Professor Ripple some years ago. I have remained consistently impressed by the scholarship of Professor Ripple, and also of his genuineness as a person, of his love of his family and country. I really can find no words to adequately describe his qualification for the office to which he has been nominated.

I have earlier, some several weeks ago, communicated my feelings to the White House, because I really think that Professor Ripple's appointment to the appellate bench would be a step in the direction of improving our judiciary.

So having been here at the coincident moment when the Professor was here, I thought I would personally indicate my support for his nomination.

The **Chairman**. Thank you very much.

Senator **McConnell**. Mr. Chairman, if I may, I would just like to say this, Congressman Mazzoli is my Congressman and I do not know Congressman Hall, but I am glad to see Congressman Mazzoli here.

You come over to this side of the Hill often, Congressman.

Mr. **Mazzoli**. Thank you very much.

And let me, if I might, just reciprocate.

Senator McConnell has been a friend of mine for a long time, even though he is a young man. He was our county judge in Jefferson County——

Senator **McConnell**.When I did that.

Mr. **Mazzoli**. A very young fellow.

He was our county judge in Jefferson County for two terms, and during which he did excellent things for our community, and I am very delighted to see him here and on your committee, Mr. Chairman. He will make an excellent member of the Senate Judiciary Committee.

We cooperate on many things from one side, of the Hill to the other and one part of Louisville to the other, so it is nice to see him.

The **Chairman**. Well, we welcome you here. And I want to say further that we are counting on your getting an immigration bill through this session. [Laughter.]

Mr. **Mazzoli**. I appreciate that very much, Mr. Chairman. Thank you.

The **Chairman**. Now, Professor Ripple, if you will come around, and Congressman Hall, if you would stand up, we will give you both the oath at the same time.

Just raise your hands.

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **Ripple**. Yes.

Mr. **Hall**. Yes.

The **Chairman**. Professor Ripple, have a seat. You are first, I believe.

You have a very fine record. There are not very many people who graduated summa cum laude from two different institutions. I believe you graduated, A.B. Degree from Fordham and a Master's Degree from George Washington University, in addition to graduating from the school of law at the University of Virginia.

University of Virginia did not give you a summa cum laude?

STATEMENT OF KENNETH F. RIPPLE, OF INDIANA, TO BE U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Mr. **Ripple**. It did not, sir, no.

The CHAIRMAN. That is an outstanding record.

Do you want to introduce your family?

Mr. RIPPLE. May I, Mr. Chairman?

I have with me today my wife, Mrs. Mary Ripple, and our three children, Gregory, Raymond, and Christopher.

The CHAIRMAN. We are very glad to have you all.

Do you have any friends you want to introduce?

Mr. RIPPLE. I do if I may.

The CHAIRMAN. All right, sir, you may proceed.

Mr. RIPPLE. First of all, I have my brother, Mr. Raymond Michael Ripple of Wilmington, DE, and a member of the Connecticut Bar. I am also honored to have in the room Hon. Joseph Baum, the chief judge of the U.S. Coast Guard; and Inspector David Hurd of the U.S. Treasury Service and a native of Indiana.

I also would like to introduce, if I may, several other friends who are also former students. First of all, Mr. and Mrs. Douglas Kenyon of the Virginia Bar and probably the youngest person to be in this room for awhile, Miss Mary Patricia Kenyon, who is not yet of the Virginia Bar but will be some day.

Also may I introduce Ms. Molly Murphy and Mr. Richard Myers, Mrs. Lynn Conway, and Mr. Sean Conway, Ms. Judith McMorrow, all of the District of Columbia Bar.

Mr. Thomas Schroeder of the North Carolina Bar, and Mr. James Molloy also of the District of Columbia Bar.

These are all men and women of Notre Dame whom I have had the honor to teach and have the honor to call my friends at this point.

The CHAIRMAN. Your friends who are members of the bar are about equal in number to Congressman Hall's Members of Congress who came over here. [Laughter.]

We are very pleased to have you.

We have a few questions here, we will proceed with you.

Professor Ripple, from 1973 to 1977, I believe you were the special assistant to the Chief Justice of the U.S. Supreme Court.

Mr. RIPPLE. That is correct, sir.

The CHAIRMAN. At that time the Chief Justice was?

Mr. RIPPLE. Chief Justice Warren Burger.

The CHAIRMAN. For the record I thought we would show that.

In that position you were responsible for the analysis of cases before the Supreme Court, the preparation of opinions, and for the local staff work required by the Chief Justice in the discharge of his judicial responsibilities.

In 1977 you became a professor of law at the University of Notre Dame. Now you have been nominated for the position of U.S. circuit judge.

Would you tell the committee what you feel would be the most rewarding aspect of serving in this capacity?

Mr. RIPPLE. Well, Senator, I believe that, in the world's attempts to govern itself judicially, the American judiciary is indeed a rare flower of human achievement, and I made my mind up a long time ago to dedicate my professional life to serving that institution.

I have been able to do that in the governmental capacity as you noted and Senator Quayle noted, and as a teacher and scholar. I now have a far more direct opportunity to participate in the work of that institution of government by seeing that our tradition of equal protection under law is indeed furthered and by also making sure that the judiciary as an institution is capable of solving this country's problems as we go into the 21st century. And it will be work continuing that tradition, being part of that tradition, which I think will give me the most satisfaction from this job.

The CHAIRMAN. Mr. Ripple, you are counsel for the Advisory Committee on the Federal Appellate Rules, which is a committee of the Judicial Conference of the United States, are you not?

Mr. RIPPLE. I am, sir.

The CHAIRMAN. One of your responsibilities is to draft changes to the Federal Rules of Appellate Procedure?

Mr. RIPPLE. That is correct.

The CHAIRMAN. Are there established procedures from which suggestions for changes are made? And how successful has your committee been in bringing these recommendations to fruition?

Mr. RIPPLE. Sir, there are established changes. As a matter of fact, the committee met yesterday and I happen to have a copy of those established procedures, and I will ask that they be entered in their totality into the record.

[Aforementioned material follows:]

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice and procedure and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. Each Advisory Committee shall submit to the Standing Committee its recommendations for rules changes.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary to the Standing Committee, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall acknowledge in writing every written suggestion or recommendation so received and refer all suggestions and recommendations to the appropriate Advisory Committee. The Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at such times and places as the Chairman may authorize.

b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

c. The Advisory Committee shall then consider the draft proposed new rules and rules amendments, together with the Committee Notes, make revisions therein, and submit them to the Standing Committee, or its Chairman, for approval of publication.

4. Publication and Public Hearings

a. When publication is approved, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally, for comment to be made to the Advisory Committee. Distribution shall be as wide as practicable and shall include the Chief Justice of the highest court in each State and all individuals or organizations that request copies of proposed rules changes. The Secretary shall also send copies to appropriate legal publishing firms with a request that the proposed rules changes be included in their publications.

b. In the light of the time required to permit full consideration of proposed rule changes by bar associations, circuit judicial conferences and other interested groups, a period of at least six months shall normally be allowed for public comment.

c. An Advisory Committee shall normally conduct public hearings on all proposed rules changes after adequate notice and at such times and places as shall be determined by the Chairman. The proceedings shall be recorded and a transcript shall be prepared for the Committee's use. The transcript shall be available to the public at the Administrative Office of the United States Courts.

d. Exceptions to the time for comment, public hearings, and publication requirements of these procedures may be granted by the Standing Committee, or its Chairman.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public comment may be provided.

b. The Secretary to the Standing Committee, in consultation with the Chairman of the Advisory Committee, shall advise every person who has commented on a proposed rules change of the Advisory Committee action thereon.

c. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

   a. The Standing Committee shall meet at such times and places as the Chairman may authorize.

   b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

   c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

   d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

   a. The Secretary shall prepare minutes of all Standing Committee meetings.

   b. The records of the Standing Committee shall consist of the minutes of Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

   c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Mr. RIPPLE. Basically, however, there is an established procedure for any member of the public to suggest changes. There is an established procedure for commentary on the changes which the committee does draft. There is also, of course, a statutory procedure by which those changes are presented to the Congress for public commentary.

Our records are entirely public now and, of course, we also invite members of the House and Senate Judiciary Committees to attend our meetings regularly, so this is the way we get our suggestions.

We have been, I think, fairly successful in receiving them and in processing them. Our established procedures require that we inform each person who makes a suggestion as to the disposition of that suggestion.

We need to work further and we are working further on encouraging the courts of appeals to have more frequent liaison with members of the bar, the practicing bar in their areas, since this is the greatest source of changes to the rules. And we have been able to make considerable progress on that I think, with the help of the clerks of court, over the last few years.

The CHAIRMAN. Professor Ripple, I feel a judicial temperament is a prerequisite for a Federal judge. I have witnessed some Federal judges that I felt flaunt their power in the courtroom, embarrassed jurors, embarrassed attorneys, embarrassed witnesses. I think this is absolutely unnecessary. There is no excuse for any public official in any public office at any time, being discourteous to the public.

I just wonder how you feel about this?

Mr. RIPPLE. I think that judicial temperament is a quality of mind, but it is also a quality of spirit.

A judge needs to be able to step back from a problem, to see both sides of it, to have a passion for justice no matter who is before him, to treat courteously no matter who is before him.

He has an obligation to apply the Constitution and the laws of the United States no matter what his personal predilections on the issue might be.

I guess that is really in the essence of the judicial temperament.

The CHAIRMAN. Professor, in response to a portion of the committee questionnaire concerning judicial activism, I believe you stated "Judicial overreaching has a short-term effect of frustrating the working of the democratic process. It has a long-term effect of debilitating the capacity of that process, to confront and to deal creatively with the country's problems. A democracy which constantly relies on its nonelected judiciary to chart its future will not remain a democracy for long."

Are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or the surrounding legislative history?

Mr. RIPPLE. Senator, as a judge, my job is to apply the Constitution and the laws of the United States and to interpret those according to their text and legislative history. And, of course, as a judge of the intermediate appellate court, I must also obey the doctrine of stare decisis and precedent. I have a boss, the Supreme Court.

The CHAIRMAN. We have two other Senators here. I am glad to see them this morning. Frequently I am the only one here, so I am very pleased to have them here.

Senator McConnell, do you have any questions?

Senator MCCONNELL. Mr. Chairman, I just would like to congratulate Mr. Ripple and Congressman Hall on their nominations. I am certain the record will justify my report of both of them. I am glad to have them before the committee this morning.

At the risk of leaving you by yourself, Mr. Chairman—I know I will not be since Senator Simon is here—I have to run on to another hearing. But I appreciate the opportunity to he here.

Mr. RIPPLE. Thank you for the honor of your attendance,

The CHAIRMAN. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

First of all, you have one of the finest Members of Congress testifying in your behalf in Rom Mazzoli and it speaks—that in and of itself speaks very highly of you.

Your record sounds like an exemplary one and I appreciated your answers.

Let me ask you this, has anyone asked you in a way that you would consider improper—I do not mean just anyone on the street, but anyone in Government, in any way asked you in an improper way how you might rule on certain cases that might come before you in the courts?

Mr. RIPPLE. Absolutely not. I have had no such inquiry, Senator, throughout this process.

Senator SIMON. I am pleased to hear that and I thank you very much.

Thank you, Mr. Chairman.

Mr. RIPPLE. May I thank you, Senator Simon, being from my circuit, coming to the hearings. I very much appreciate that.

Senator SIMON. I am pleased to have you join that circuit.

Mr. RIPPLE. Thank you, sir.

The CHAIRMAN. Professor Ripple, I think that is all the questions I had in mind.

I again congratulate you and I feel certain you will be confirmed, and I wish you a happy tenure on the bench.

Mr. RIPPLE. Thank you, Senator, and may I thank you for the courtesy of your staff throughout this process and, of course, Senators Lugar and Quayle for their support, and of course, the President of the United States for giving me this opportunity to serve the country. I deeply appreciate it.

The CHAIRMAN. You are excused. You can remain if you wish or you may depart.

Mr. RIPPLE. Thank you, Senator.

The CHAIRMAN. Congressman Hall, if you will come around, please.

STATEMENT OF HON. SAM B. HALL, JR., OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Mr. HALL. Thank you.

The CHAIRMAN. Have you introduced all of your family and friends that you want to introduce?

Mr. HALL. Yes, Senator; they have all been introduced.

The CHAIRMAN. Knowing you so well, I feel a little embarrassed to ask you any questions.

I personally think you will make an outstanding judge and I am very pleased the President saw fit to appoint you. I think you are well qualified to do a great job.

Congressman Hall, it is a pleasure to welcome such a distinguished Member of the House of Representatives before this committee today. You have been a Member of Congress since 1976 and presently serve on the House of Representatives Judiciary Committee, where you chair the Subcommittee on Administrative Law and Government Relations and serve as a member of the Subcommittee on Immigration, Refugees and International Law, as well as the Veterans Affairs Committee.

You have been a busy man. Prior to your election to Congress, I believe you were a practicing attorney for 28 years, and I noticed in reviewing your record that you were appointed special county judge by the county court of Harrison County, TX, in 1969. You served in this capacity for approximately 8 months.

Congressman Hall, do you believe this vast experience will be beneficial to you as a U.S. district court judge? And if so, how?

Mr. HALL. Senator, I think with the background that I have in the law practice, 28 years in both Federal and State, probably equally divided, and my service on the Judiciary Committee and the chairman of this subcommittee that you mentioned, qualifies me to serve on the bench.

I think that any judge who serves must have a background that, in essence, qualifies him to pass on matters of great importance to people. In the 9 years that I have served in the Congress—of course my record is open for all to see, it is of course a public record—and I think the voting record that I have tried to keep while here has been one that is for the betterment of people, on the process of limited government, and based on those factors and the extensive trial litigation that I had before coming to Congress, I think that puts me in good light to serve as a U.S. district judge.

The CHAIRMAN. Congressman Hall, as a practicing attorney and a Member of Congress, you have had the opportunity to both make laws as well as to utilize and interpret them.

With this background do you believe that changes in the law should be reserved to the legislators whose members can be altered by the voters if the elected official fails to affect the values of society?

Mr. HALL. Yes, I do. I have become more conscious, the longer I stay in Congress, that we have a duty and an obligation as a Member of Congress to try to have a legislative record that the courts could interpret if necessary in arriving at certain decisions that it might have to make. I believe that the courts should not try to amend the Constitution of the United States. I think we have had too much of that in the past already. I think it is the duty of the courts to interpret what the Constitution means and what those people meant when they wrote it years and years ago.

I do not believe that there should ever be—I do not think there is ever a place for a judge to try to put himself or herself in the place of what the legislative people might have done had they done it.

And I think that Judge Learned Hand made a statement once that when a judge starts trying to interpret what the legislature has not done and put his interpretation upon what they should have done, that sooner or later you are having a departure from legislative intent. And I think that is not the position or not the place that a judge should place himself.

The CHAIRMAN. Congressman Hall, in response to a portion of the committee questionnaire, in saying "judicial activism," I believe you stated in part:

> The oaths to uphold the Constitution of the United States should and does remain constantly within the focus of a judge. This in my opinion means exactly what it says, that a judge is bound to uphold the Constitution, not what some other judge holds in distorting the Constitution.

Now, Congressman Hall, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. HALL. Senator, stare decisis is something that every judge should follow, there is no question about that. It is a doctrine, it is one of policy, but it is not one that is set in absolute concrete.

If we had followed the rule of stare decisis in its complete entirety, we would never have had *Brown* v. *The Board of Education*, which overturned the *Plessie* case of many, many years ago. I think that it is the duty of the judge to always have a picture of the Constitution before him when he is presiding or when he is preparing an opinion or issuing a ruling.

I do not believe that any judge should in all cases state that he must follow the rulings of the court if he sincerely and conscientiously believes that ruling is wrong.

I believe that all of the definitions of stare decisis state that, as I said, it is a matter of policy, it should be followed; however, if circumstances arise in the trial of a case where you feel that you must depart based upon the facts and circumstances that have been presented to you, I think it is the duty of that judge not to just blindly follow merely because someone else has put an interpretation upon the Constitution which you sincerely deeply believe is erroneous.

That is the position that I take.

The CHAIRMAN. I am glad to hear you take that position. Some people feel that stare decisis is binding forever, and as you stated, there are instances in which a court has reversed itself and it seems that that should be certainly the freedom of the court to do so.

The distinguished Senator from Illinois.

Senator SIMON. I have no questions.

I had the privilege of serving for—8 years? I am not sure.

Mr. HALL. Eight years.

Senator SIMON. Eight years—with the distinguished Congressman from Texas. He will make a superior judge beyond any question. And I just want to say, get into the record, that for future years I want the record to show I knew him when.

Mr. HALL. Senator, I appreciate that very much. And that relationship in the Congress was a very happy, a very happy one and one that I will always remember.

Senator SIMON. If I could just add, our nominee was a very solid substantial member of the House who contributed a great deal, and I am sure he is going to do that in the courts, too.

Mr. HALL. Thank you very much.

The CHAIRMAN. I did not serve in the House with him, I have never served in the House, but I have known him for years and I have had great respect for him. I am very pleased that the President has appointed him to the Federal district bench and I predict he will make one of the outstanding judges in this country. He is a man with a lot of commonsense and a man who understands the Constitution and respects it—and those are the kind of people we need on the bench.

Again I congratulate you on your appointment. I hope you enjoy your tenure of service as Federal judge.

Mr. HALL. Thank you, Senator Thurmond, Senator Simon.

The CHAIRMAN. Now, we are going to try to get you gentlemen on the agenda for tomorrow. We have a meeting tomorrow; Senator Simon, if you will help to get all the Democrats here, we can get action tomorrow on these fine gentlemen.

Senator SIMON. I do not think there should be any problem with these two.

The CHAIRMAN. The problem would be getting some of the members here to act. [Laughter.]

Senator SIMON. I understand.

The CHAIRMAN. And if you would help us on that, we would appreciate it.

Senator SIMON. All right.

The CHAIRMAN. That is all the nominations we have this morning, so we now stand adjourned.

[Whereupon, at 9:47 a.m., the committee adjourned.]

BIOGRAPHIES

KENNETH F. RIPPLE

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT

Birth: May 19, 1943, Pittsburgh, PA.

Legal residence: Indiana.

Marital status: Married to Mary DeWeese Ripple, 3 children.

Education: 1965—Fordham University, A.B. degree, summa cum laude; 1968—University of Virginia School of Law, J.D. degree; 1972—George Washington University National Law Center, LL.M. degree summa cum laude.

Bar: 1968—Virginia; 1969—New York; 1970—District of Columbia; 1984—Indiana.

Military service: 1968-72—United States Navy; (1972-present)—United States Naval Reserve, Judge Advocate General Corps.

Experience: 1968—IBM, Ofc. of the General Counsel, attorney; 1972-73—Supreme Court of the United States, legal officer; 1973-77 Supreme Court of the United States, special assistant to the Chief Justice; 1977-present—University of Notre Dame, professor of law.

SAM B. HALL, JR.

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TEXAS

Birth: Jan. 11, 1924, Marshall, TX.

Legal residence: Texas.

Marital status: Married to Mary Madeleine Segal, 3 children.

Education: 1940-42—College of Marshall, (now East Texas Baptist Univ), A.A. degree; 1942-43—University of Texas School of Law; 1945-46—Baylor University; 1946-48—Baylor University School of Law, LL.B. degree.

Bar: 1984—Texas.

Military service: 1943-45—U.S. Air Corps.

Experience: 1948-49—Lane, Hall & Lane; 1949-62—Smith and Hall; 1962-72—Smith, Hall & Huffman; 1972-75—Hall & Huffman; 1975-76—Hall, Huffman & Palmer; 1977-present—U.S. Congressman, House of Representatives.

CONFIRMATION HEARING ON: JOHN P. MOORE AND GEORGE F. GUNN, JR.

WEDNESDAY, MAY 1, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 8:37 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Simon.

Staff present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We are meeting today to hold a hearing on Judge John P. Moore of Colorado to be U.S. circuit judge for the tenth circuit; and U.S. district judge, Judge George F. Gunn, Jr., of Missouri, to be U.S. district judge for the Eastern District of Missouri.

Are there any Senate Members here at this time or House Members to testify?

Senator EAGLETON. Yes, and Mrs. Armstrong is here this morning.

The CHAIRMAN. That is fine. We are delighted to have her; she is a lovely lady.

We will take the Senators first, if that is agreeable, since I know they are busy. Do you have a preference as to who is most urgent this morning, as to which nomination? Mrs. Armstrong, are you in a hurry?

Mrs. ARMSTRONG. Good morning, Mr. Chairman. I would just like to introduce to you this morning Judge Moore, his wife, his mother, and his daughter, if I might.

The CHAIRMAN. You can come up to the table.

Do you have any other family with you?

Judge MOORE. Mr. Chairman, I do have my mother, Carolyn, seated behind me, and my wife, Terry, and my daughter, Katrina.

The CHAIRMAN. We are very pleased to have you all with us.

Senator Armstrong could not be here; he had another engagement, but I want to congratulate you for having his endorsement. He is one of the finest men in the Senate and we are very pleased to have you here and to have his lovely wife there to represent him.

Senators, I guess we might take you next and let you introduce your—Mrs. Armstrong, did you want to say anything in addition about Judge Moore?

Mrs. **Armstrong**. Judge Moore is a dear friend of ours. We have known him for many, many years and we just love him very much and his family and we know that he is uniquely qualified for this position, and we bring him to you with great pride and honor this morning.

The **Chairman**. You strongly recommend him?

Mrs. **Armstrong**. Yes, strongly.

The **Chairman**. Thank you very much.

Now, we have the distinguished Senators from Missouri here, Senator Danforth and Senator Eagleton. We would be glad to hear from you.

Senator **Eagleton**. I will yield at this time to Senator Danforth.

The **Chairman**. Before we begin, I wish to place a statement of Senator McConnell in the record.

[Statement follows:]

Prepared Statement of Senator McConnell

Mr. Chairman, it's a pleasure to be here today to hear from Judge Moore and Judge Gunn in connection with their nominations for seats on the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Eastern District of Missouri, respectively. It is also a pleasure to hear from the distinguished individuals here today to speak on their behalf

I would like to congratulate the gentleman in advance on their nominations. It's always good to see nominees with such bipartisan support, and I look forward to supporting their confirmation.

Thank you, Mr. Chairman.

STATEMENT OF HON. JOHN DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator **Danforth**. Mr. Chairman, thank you very much. It is a great honor for me to be here today with Judge George Gunn, who has been nominated by the President for U.S. district judge for the Eastern District of Missouri.

Judge Gunn has a very distinguished career. He now serves on our State supreme court. He has served on the supreme court since 1982. Prior to this position, he served for 9 years on the Missouri Court of Appeals in the Eastern District in St. Louis.

Prior to that, he practiced law for a number of years, including a stint as county counselor in St. Louis County, which is the legal office for St. Louis County.

The method that I use in recommending names to the President is to create a panel with the help of the law schools in the half of the State with the vacancy and with the help of the Missouri Bar.

A five-person commission is created, and they, in turn, receive recommendations and interview candidates and look through their files, and they recommend three names to me. After an extensive search, they recommended three names, one which was Judge Gunn, and I, in turn, sent his name to the President.

I think that one of the great gifts of George Gunn is his temperament. All of us who have practiced law know how important it is in a trial court to have a judge with a good temperament, a person who can deal fairly with lawyers and with their clients, a person who is not full of himself, and a person who is not given to the well-known disease of federalitis.

That characterizes George Gunn; he has such a temperament. He is a person who is a warm person and a person who is modest in his demeanor and friendly. One of the things that I think is exciting about this particular nomination is the enthusiasm with which it is met by people I know who are on the judiciary who have known George Gunn, who have worked with him in the past, those on the Federal bench in St. Louis who look forward to working with him now.

So, Mr. Chairman, I appreciate your hospitality this morning, and it is truly an honor for me to present Judge Gunn to the committee.

The CHAIRMAN. Thank you very much, Senator.

We will be glad to hear from you now, Senator.

STATEMENT OF HON. THOMAS EAGLETON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. Thank you, Mr. Chairman. I will be brief. I wish to echo and underscore the remarks of my colleague, Senator Danforth. I think that Judge George Gunn is tremendously well qualified to serve as a Federal judge.

As Senator Danforth has pointed out, he has served both on an intermediate appellate court in Missouri, in St. Louis, and on the Missouri Supreme Court, and he will bring to the Federal judiciary both his talents and his temperament, both of which are indispensable, in my judgment, to being an able Federal judge, which I am most certain that he will be. I enthusiastically recommend his to this committee.

Mr. CHAIRMAN. We are very glad to have you Senators here, and I want to congratulate Judge Gunn on having the endorsement of both of his Senators. You have a Republican Senator endorsing you, you have a Democratic Senator endorsing you, and you have been appointed by the President and so there should be no trouble in getting you through at all. And I just want to congratulate you and wish you well on the bench.

Judge GUNN. Thank you so much.

The CHAIRMAN. And for you distinguished Senators, we appreciate your being here. These are very influential men; they are very busy and we are delighted to have them come and speak in your behalf.

Senator DANFORTH. Mrs. Gunn is also present.

The CHAIRMAN. I will be glad to have her stand.

[Mrs. Gunn stood.]

The CHAIRMAN. We are glad to have you with us.

Mrs. GUNN. Thank you.

Senator DANFORTH. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Danforth, we are glad to have you and Senator Eagleton.

Now, Mrs. Armstrong, if you will come back up here and sit with him, if you would like to.

Now, I will swear both of you in at once, if you will both just stand and raise your hands. The testimony you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge GUNN. I do.

Judge MOORE. I do.

The CHAIRMAN. Now, Judge Moore, I believe you were born in Denver, CO.

STATEMENT OF JOHN P. MOORE, OF COLORADO, TO BE U.S. CIRCUIT JUDGE FOR THE 10TH CIRCUIT

Judge MOORE. That is correct, Mr. Chairman.

The CHAIRMAN. That is where my wife was born.

Judge MOORE. I am glad to hear that.

The CHAIRMAN. Her parents were from Montana, but her father was with the DuPont Co., stationed near Denver at a little place called Louviers. Have you ever heard of Louviers?

Judge MOORE. Certainly, yes.

The CHAIRMAN. They were living out there at the time.

Mrs. Armstrong, you did not know my wife was a fellow Coloradan, did you?

Mrs. ARMSTRONG. Yes, I did.

The CHAIRMAN. Judge Moore, it is good to see you and I believe you were last before this committee in July of 1982 when you were being considered for the position you presently hold as a district court judge for the District of Colorado.

I hope you have enjoyed your tenure on the trial bench. Would you tell the committee what difficulty, if any, you perceive in meeting the challenges of the appellate court?

Judge MOORE. Mr. Chairman, I do not really anticipate many difficulties. I think my experience in the past would make me qualified for this position. I have spent extensive time in private practice and in the State service in the appellate area, and as both a bankruptcy judge and as a district judge I have done the kinds of work that is expected in the appellate bench.

The CHAIRMAN. Now, Judge, when you were here before the committee in 1982, I believe I asked you if you believe that it would be helpful as a U.S. district court judge to have a sentencing commission to establish uniformity in sentencing. I believe you responded:

> It is my personal experience that the function of the court should be exercised by the judge who has the last decision to make. It would certainly be helpful, and I think even practical, to have some sort of frame of reference for the judge to consider. I think in the last analysis it must be the judge who alone makes the choice of how to deal with the individual in view of the crime of which he is convicted.

Now, Judge, after serving 3 years as a district court judge, have your views changed at all with regard to the establishing of a sentencing commission? If you recall, we have now established that commission and it will be underway pretty soon, I think.

Judge MOORE. Well, obviously, Mr. Chairman, my views have changed to the extent that the Congress has enacted that provision, and as a district judge or as a——

The CHAIRMAN. Speak a little louder. I cannot hear you.

Judge MOORE. The Congress has enacted the provision into law and, of course, my views would have to change accordingly. As a district judge or as a circuit judge, I would certainly apply that statute as vigorously as possible.

One of the loneliest functions a trial judge has in either the State or the Federal system is the sentencing of criminal defendants, and I think that the Congress, in establishing the commission, has alleviated some of that loneliness.

I am glad to see that the Congress has left some discretion to the trial judge to particularize every sentence. To that extent, my views have not changed.

The CHAIRMAN. Under the guidelines, a judge can go below or above that sentence, but he has to explain if he does.

Judge MOORE. That is correct.

The CHAIRMAN. And so that leaves him the freedom I think he needs.

In recent years, Congress has given a great deal of consideration to reform of Federal habeas corpus procedures. Would you give us your views on the need for reform in this area?

Judge MOORE. Well, my answer has to be very parochial, Mr. Chairman. I am only experienced to the extent of the matters in my district, and I have found in the District of Colorado that there is not an overburdening of our system with State habeas applicants.

The State of Colorado, in its own wisdom, has established a system which allows those matters to be dealt with generally in State courts. And from my own perspective, then, I do not see the need for any change. That does not mean that nationally it should not occur; it is just that I do not feel competent to speak on this topic.

The CHAIRMAN. Now, in response to a portion of the committee questionnaire concerning judicial activism, I believe you stated:

> The best forum for changing the mores or standards of society or for providing remedies to social problems is in the legislative branch where the nuances of change can be fairly debated from all perspectives. Without such debate, it is unlikely that all ramifications of a potential solution become apparent. That, in my opinion, is the reason why judicial opinions produce results neither intended nor deserved.

Now, Judge, we frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How do you respond to this defense of an activist judge?

Judge MOORE. Obviously, from my response, I believe wholeheartedly in the fact that the separation of powers is a sacrosanct doctrine, and I firmly believe that courts must step slowly in these areas, but I also believe that the Constitution and the oath of the judiciary requires every judge at some point to take into consideration any case in which the individual's rights have not been addressed.

My belief is that the courts should generally leave to the legislative and the executive branches of government, in the first instance, the creations of answers to problems, But when that fails, and when individual rights are put in jeopardy, then the courts must act swiftly to protect those rights.

The CHAIRMAN. Since my wife was a Moore before she married, I guess I would have to tell her now that she will soon be having a new circuit court judge cousin. [Laughter.]

I think that is all the questions we have.

Judge MOORE. Thank you, Mr. Chairman.

The CHAIRMAN. Again, I wish you well on the circuit bench. Again, I want to thank Mrs. Armstrong for coming here, and anything Mrs. Armstrong wants around here, she will get.

Judge MOORE. Thank you, Mr. Chairman. I am particularly pleased that she was able to come.

The CHAIRMAN. Senator Simon, did you have any questions?

Senator SIMON. Yes.

First of all, my congratulations both to you and to Judge Gunn. I hear excellent things about both of you. Let me ask just two questions. One, has anyone either from the Senate or Senate staff or in the administration asked you any questions that you would think improper?

Judge MOORE. None whatsoever, Senator.

Senator SIMON. I am pleased to——

Judge MOORE. I have been exposed to no litmus test whatever.

Senator SIMON. All right, I am pleased to hear that.

The American Bar Association Code of Professional Responsibility, Canon 2, says, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

Can you tell me what you have done to fulfill that particular canon?

Judge MOORE. Well, in the early years, Senator, I can say it was not necessarily planned, but it worked out that way. I spend more of my time working free than I did for pay. I have, in addition to that, belonged to organizations I think appear in my biography which lent their support not only in legal ways, but in other ways within the communities in which I lived. To that extent, I have always donated my time.

Senator SIMON. I appreciate that. I have no further questions. I would just say to the young lady who I assume is your daughter, how old are you, young lady?

Ms. MOORE. Eleven.

Senator SIMON. Eleven. I hope you always remember this day when your father made his first step here to become a Federal judge. That is so that you and all the 11-year-olds in this country can maintain that freedom.

Thank you very much.

Judge MOORE. Thank you, Senator.

Senator SIMON. Thank you, Mr. Chairman.

Judge MOORE. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. We are delighted to have you all with us.

Mrs. ARMSTRONG. Thank you, Mr. Chairman.

The CHAIRMAN. Tell your husband that you represented him just as well as if he had been here.

Next is Judge Gunn, if you will come around, Judge Gunn. Judge Gunn, I believe you have been a judge of the Missouri Supreme Court since August 1982.

STATEMENT OF GEORGE F. GUNN, JR., OF MISSOURI, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI

Judge GUNN. Yes, sir.

The CHAIRMAN. This court, I believe, has exclusive jurisdiction over appeals from the death penalty, revenue matters, constitutional issues, and all cases transferred to the supreme court from State courts of appeal.

Judge GUNN. That is correct

The CHAIRMAN. Judge, do you foresee any difficulty in the transition from your present position in the Missouri Supreme Court to that of trial judge at the Federal district level?

Judge GUNN. No, sir, I do not. Even now, although I am an appellate judge, I do teach trial advocacy before law schools and before members of the practicing bar, and I have kept myself familar with trial practice; have reviewed well over a 1,000 cases involving trials.

The CHAIRMAN. Judge Gunn, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

Judge GUNN. Well, first of all, I do not believe in punishing somebody who is well prepared, so you should not take over a case. But at the same time, I do not think a lawyer should ever be embarrassed before his client or the jury.

I counsel with lawyers frequently and I suspect the best thing to do would be, after trial or maybe outside the hearing of the jury, counsel with him a little bit. I think that would be helpful.

The CHAIRMAN. Judge Gunn, one of the characteristics of judicial activism is said to include a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Would you give your commitee your views on this criticism?

Judge GUNN. Well, I do not think the court is particularly an expert to handle administrative matters and that would be better left for the administrative agency that would have the expertise in those areas.

I think a court that deals with matters that are not before it, issues that are not before it, is just getting itself in trouble.

The CHAIRMAN. Another critism of judicial activism is a tendency by the judiciary to problem solution rather than grievance resolution. Do you feel that this criticism is valid?

Judge GUNN. Well, I think it is perhaps a valid criticism, but at the same time I think a court should just deal with the issues that are before it. As I mentioned, I think a court can get in trouble by going beyond the matters that are at hand.

The CHAIRMAN. Do you have any questions, Senator Simon?

Senator SIMON. Yes basically the same two questions, Judge. The first is, has anyone—either a member of the Senate or Senate staff or anyone in the administration—asked a question that you felt was improper?

Judge GUNN. No, sir, I have not been approached in that regard in any way by anyone.

Senator SIMON. And then the second question you heard me read from the code of Professional Responsibility on your responsibility as an attorney to help the disadvantaged. Could you just describe anything you may have done in that area?

Judge GUNN. Yes. Like Judge Moore, when I was practicing I spent a good deal of my time doing pro bona work and I enjoyed it. Even now, I visit mental institutions and visit patients there, and I have a great feeling for people whc are disadvantaged.

Senator SIMON. I thank you very, very much, and I might just say for the record every indication, the Senators from Colorado and from Missouri have provided us with two excellent nominees and we are honored to have you here, Judge Gunn.

Judge GUNN. Thank you so much.

The CHAIRMAN. Judge, I want to wish you well on the bench. Incidentally, I have a letter from Raymond F. McNally, Jr., a lawyer in St. Louis who endorses you highly.

Judge GUNN. Fine, thank you.

The CHAIRMAN. I was with him in World War II, so we have been friends a long time and I deeply appreciate his opinion about you, although the record otherwise sustains his position, too.

Judge GUNN. General McNally speaks so highly of you, too, sir.

The CHAIRMAN. Thank you very much. Well, good luck to you and I hope you enjoy your service on the bench.

Judge GUNN. Thank you so much.

The CHAIRMAN. We are glad to have you with us, Mrs. Gunn.

I believe that is all the nominations we have this morning and so we will now stand adjourned.

[Whereupon, at 8:59 a.m., the committee was adjourned.]

BIOGRAPHIES

JUDGE JOHN P. MOORE

NOMINEE, U.S. CIRCUIT JUDGE, TENTH CIRCUIT

Birth: Oct. 14, 1934, Denver, CO.

Legal residence: Colorado.

Marital status: Married to Theresa L. Smith, 3 children.

Education: 1952-54—Stanford University, no degree; 1954-56—University of Denver, B.A. degree; 1956-59—University of Denver, LL.B . degree.

Bar: 1959—Colorado.

Experience: 1959-62—Carbone & Walsmith, associate; 1962-75—State of Colorado Law Department: (1962-68), Assistant Attorney General; (1968-72), Deputy Attorney General; (1972-75), Attorney General; 1975-82—U.S. Bankruptcy Judge, District of Colorado; 1982-present—U.S. District Judge, District of Colorado.

JUDGE GEORGE F. GUNN, JR.

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MISSOURI

Birth: Oct. 29, 1927, Fort Smith, AR.

Legal residence: Missouri.

Marital status: Married to Priscilla Johns Gunn, 3 children.

Education: 1946-50—Westminister College, A.B. degree; 1952-55—Washington University Law School, J.D. degree.

Bar: 1955—Missouri.

Military service: 1945-46—U.S. Navy.

Experience: 1955-56—Gleick & Strauss, associate; 1956-58—Wabash Railroad Company, assistant general attorney; 1958-68—Rebman, LaTourette & Gunn, partner; 1963.71—City Attorney, city of Brentwood, MO; 1968-71—Terminal Railroad Association, general attorney; 1970-71—Municipal Judge, City of Rock Hill, MO; 1971-73—St. Louis County Counselor, St. Louis County Government; 1973-82—Judge, Missouri Court of Appeals, Eastern District; 1982-present—Judge, Missouri Supreme Court, Jefferson City, MO.

CONFIRMATION HEARING ON D. LOWELL JENSEN

WEDNESDAY, MAY 15, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to call, at 10:31 a.m. in room 226 of the Dirksen Senate Office Building, Hon. Orrin G. Hatch (acting chairman) presiding.

Also present: Senators Mathias, Specter, McConnell, Grassley, Kennedy, Biden, and Simon.

Staff present: Duke Short, chief investigator; Stephen J. Markman (Senator Hatch); Cynthia C. Lebow, minority staff director.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator Hatch. I wish to welcome Mr. Lowell Jensen to the Committee on the Judiciary this morning. Mr. Jensen stands as nominee for Deputy Attorney General of the United States, the second highest position in the Department of Justice.

I strongly support Lowell Jensen's nomination, not only because Mr. Jensen has the good fortune and judgment to be born in the great State of Utah, but because he has been an excellent public servant within the Department of Justice.

Lowell Jensen's credentials are well-recognized by the members of this committee. He has served with distinction during the past 4 years as Associate Attorney General of the United States and as head of the Justice Department's Criminal Division. It is no accident that during this time the Congress has enacted some of the most important and far-reaching criminal law reforms in the form of legislation in the history of the country.

As the result of the leadership of Lowell Jensen, we have seen the enactment of major initiatives in the areas of bail reform, sentencing reform, the insanity defense, forfeiture, drug enforcement, juvenile delinquency prevention, racketeering, career criminals, and white-collar crime.

Lowell Jensen's contributions to the operations of the Justice Department and to public policy generally, of course, go far beyond the criminal justice area. As Associate Attorney General, he has exercised leadership and administrative ability throughout the range of responsibilities within the Department of Justice.

Again, it is our pleasure to welcome you, Lowell, to the committee once again, and I would urge the committee to move with expedition on this nomination, as I am confident that it will.

I turn to Senator Kennedy at this point.

Senator **Kennedy**. Thank you, Mr. Chairman, I, too, want to commend the President and the Attorney General for the selection of this nominee. As you have mentioned, he is no stranger to this committee and no stranger to the issues which this committee has been involved in over a long period of time.

I welcome the opportunity to work with him.

A number of years ago, when we were considering at that time the reshaping of LEAA legislation, I remember the great extent we drew on Mr. Jensen's experience as a district attorney and his knowledge about the kinds of programs that could have some impact and effect upon violence in our society. Ever since then he has been very available to the members of this committee, and I must say in a personal way on each and every occasion that I have had the opportunity to talk with him about policy matters and issues, he has been responsive and innovative. I think this really is an outstanding choice for the Justice Department. We have had a good, positive working relationship. So although, of course we do not agree on all issues, I look forward to continuing this relationship.

And I look forward to supporting his nomination.

Some of the critical law enforcement responsibilities you will have if confirmed as Deputy Attorney General will include Federal efforts to reduce violent crime and street crime, the fight against the epidemic of drug trafficking and organized crime. In addition, you will be responsible for implementation of the long overdue reform of Federal sentencing which has been a special concern of mine.

I believe that it is very important in the Department of Justice to have top officials who know law enforcement first hand. People who know from experience the ins and outs of dealing with the FBI, the Secret Service, U.S. Attorneys, the Marshall Service, the Bureau of Prisons, and all the other parts of Federal executive branch areas of our criminal justice system.

So I am indeed delighted to see you before the committee as the nominee for Deputy Attorney General and I have every expectation that you will be confirmed and will serve this Nation in that position with distinction.

Senator **Hatch**. Thank you, Senator Kennedy.

Senator Mathias.

Senator **Mathias**. I would join in congratulating Mr. Jensen and in welcoming him back to the committee.

Senator **Hatch**. Thank you. At this point, Senator Warner, we will turn to you. We are happy to have you here, taking time from your busy schedule to introduce Mr. Jensen to the committee.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. Thank you, Mr. chairman and members of the committee. I wonder if I might first ask the Chairman to recognize Barbara Jensen, the wife of the nominee, who has joined us.

Senator **Hatch**. I would be happy to do that. We welcome you, Mrs. Jensen, and of course your friends who are here, and members of the staff—we welcome you to the committee and we hope this will be an enjoyable experience for you.

Senator WARNER. In view of the comments of the distinguished members of this committee, I think I will make my introduction most brief.

We first learned of the excellent qualfications that have guided Lowell Jensen's distinguished career and won him the respect of his peers when he came before this committee, as cited by Senator Kennedy, in 1981 for confirmation as assistant attorney general.

Before turning to Federal service at the Department of Justice, Mr. Jensen prosecuted some very celebrated cases as the district attorney of Alameda County, California.

He has also lent his talents to lecturing and instructing various bar associations and law schools on the changing facets of criminal law.

The nominee's 4 years at the Department of Justice have been marked with many accomplishments. Most noteworthy is the Comprehensive Crime Control Act of 1984, which was unanimously approved by this committee and eventually became public law.

He played a pivotal role in the development and further refinement of the bill when he was in charge of the criminal division and later as the associate attorney general.

In his new command as deputy attorney general-designate, he remains actively involved in the effective implementation of this landmark legislation.

Mr. Chairman and members of the committee, I believe we are well-informed of Mr. Jensen's outstanding qualifications as an instructor in criminal law, a manager respected by his peers, and a successful prosecutor.

His professionalism in the field of law enforcement is unquestioned, and I wholeheartedly recommend him to the committee for confirmation as Deputy Attorney General.

I thank the chair and members of the committee.

Senator HATCH. Well, thank you so much, Senator Warner. We appreciate your taking this time and being with us today.

We will place in the record at this point a letter from the Honorable Pete Wilson:

> I want to express my strong support for the nomination of J. Lowell Jensen to serve as Deputy Attorney General of the United States. I apologize for my inability to appear today before your committee.
>
> As I testified the last time that Mr. Jensen was before your Committee for confirmation hearings, I have been privileged to know Lowell for a great many years. His training, vast experience in the law, and his personal integrity will well serve him in his new job at the Department of Justice, and, more importantly, will serve our nation.
>
> I urge you and your Committee to act with deliberation and appropriate speed to bring Mr. Jensen's appointment before the full Senate so that we might soon act to confirm him to his new post.
>
> Thank you for your consideration.
>
> PETE WILSON.

Another letter from Paul Trible:

> Dear STROM: I write to indicate my strong support for the nomination of D. Lowell Jensen to serve as Deputy Attorney General.
>
> Mr. Jensen is a resident of Virginia, and I regret that I will be unable to introduce him at his confirmation hearing. As you know, I will be chairing the Joint Foreign Relations-Judiciary Committee hearings on terrorism at that time.

I would appreciate it greatly if you would indicate to the Committee my support for Mr. Jensen and explain to your colleagues the reasons for my absence in your opening statement.

Again I am sorry that I cannot attend the confirmation hearing, but I would ask that this letter be read into the hearing record, and that you give Mr. Jensen your full support.

Thank you for your consideration.

Sincerely,

PAUL TRIBLE.

Mr. Jensen, let's swear you in.

[Nominee stands, raises his right hand, and is duly sworn.]

Thank you, sir. Do you have any opening statement that you would care to make?

TESTIMONY OF D. LOWELL JENSEN, NOMINEE TO BE DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Mr. JENSEN. Mr. Chairman, I would like to make a brief statement.

Senator HATCH. Could I hold you just a second—I notice Senator Simon just arrived. I hadn't noticed before I asked you.

Do you have any opening statement?

Senator SIMON. I do not. Thank you.

Senator HATCH. Well, then, we will turn to you, Mr. Jensen.

Mr. JENSEN. Thank you very much, Senator, Senator Kennedy, Senator Mathias, Senator Simon. I am obviously pleased to be here today to participate in this proceeding, and I would like to express my appreciation at this time to Senator Warner for his kind remarks and for taking the time to be here today.

I would like to also thank an old friend, Senator Wilson, and Senator Trible for their kind remarks, and for those that have been addressed here at the committee. I would like to express my appreciation obviously to the President for his nomination and his confidence in me.

As you pointed out, I have had the opportunity and the privilege to serve in the Department of Justice as Assistant Attorney General of the Criminal Division and as Associate Attorney General, and I look forward to the opportunity to serve in that Department as the Deputy. It's a very real challenge, it's one of those opportunities that comes to very few, and I feel very humble in terms of the nomination and the ability to be able to carry out that duty.

I would only say that I have had the opportunity to be here before this committee, and, as has been pointed out, I think there has been an enormous advance as far as Federal criminal justice accomplishments—a great deal by working with this committee and with the Department, and I feel proud to have been able to do that in the Crime Control Act, and I think we have a great responsibility in terms of implementing that now.

So I look forward to working with this committee and to the challenge, as it really is, to work within the Department of Justice to see that its traditions and their excellence and its standards are maintained.

So with that I would be very happy to answer any questions.

Senator HATCH. Thank you, Mr. Jensen. Senator McConnell, do you have any opening remarks?

Senator MCCONNELL. Thank you, Mr. Chairman. I, too, intend to support you, Mr. Jensen. I do have a few questions when we get back to that, and look forward to hearing your responses.

Senator HATCH. Thank you, Senator. Mr. Jensen, traditionally the Deputy Attorney General has been responsible for oversight of the day-to-day operations of the Justice Department.

Do you expect to fulfill that role as Deputy Attorney General?

Mr. JENSEN. Yes, I do not anticipate there will be any change in the traditional responsibilities of the Deputy, and I anticipate to fulfill that role.

Senator HATCH. Would you tell us on the committee what your responsibilities and duties will be as Deputy Attorney General, and have you in fact discussed these responsibilities and duties with Attorney General Meese?

Mr. JENSEN. Yes, I have discussed them, and I would like to point out that we would bring this to the attention of the committee at the time any final decisions are made, but in addition to the traditional role, as has been pointed out, of the Deputy for day-by-day operations, within the Department there have been functional divisions essentially because the Department is so far-flung and because of the fact that it deals with basically the civil and criminal issues of the Federal Government. The reporting responsibilities within the Department, at this point now, run through the Associate insofar as the criminal components of the Department are concerned. We are contemplating that there would be a change in that relationship to return to the relationship that existed before this administration where the Deputy was the person within the Department to whom the criminal components reported. I think that would be the kind of change we would contemplate given my background, experience in the Department, my expertise. So that with only that change we would go forward with the Department in terms of its traditional kinds of responsibilities.

Senator HATCH. Mr. Jensen, Senator Thurmond asked me to specifically ask you this question.

As you know, the President is currently engaged in the selection process for commissioners of the newly authorized U.S. Sentencing Commission. Hopefully, the Commission will soon be implemented and begin formulating new Federal sentencing policies.

What role do you feel the Justice Department will play in assisting the Commission in carrying out this important function?

Mr. JENSEN. I may say that I agree with the premise that the sentencing commission has an enormously important role to play. The sentencing commission needs to get in place, and they have a very difficult time ahead—I wouldn't say "difficult," but rather have responsibilities that are time-constrained.

The Department has played a role in terms of the consultative process that was required by the statute to identify persons who could serve on that Commission in addition to the members of the Federal judiciary nominated by the judicial conference.

All of the nominees now have been processed, and I think that you will see the President's appointments coming to the Senate for their review within this month.

Now, in terms of the follow-on, the Department has very specific responsibilities. The Attorney General is an ex officio member of the sentencing commission and will serve on that Commission either personally or through a designee as an ex officio member. In addition to that, the Department has any number of activities, and specifically the statute requires the Criminal Division to provide support to the sentencing commission. We contemplate doing precisely that through the Bureau of Justice Statistics, through the Bureau of Prisons, through the Parole Commission, through all of the information that is now in existence—we will provide to the sentencing commission the kind of background data and information they need to get on with their important work.

Senator HATCH. I believe Senator Thurmond would also like me to ask: Do you feel that the exclusionary rule, habeas corpus, and death penalty legislation which passed the U.S. Senate last year by an overwhelming margin and which has been reintroduced will be high-priority items for your Department, and would you briefly explain the Department's position on those issues.

Mr. JENSEN. Well, as you know, the items that you refer to were a part of the administration's positions, the Attorney General's position, in the last Congress, and they did pass the Senate; they did not get enacted into law. But we supported them then, we support them now.

As you point out, there have been individual bills introduced with reference to each of those topics, and we would look forward to supporting them.

Senator HATCH. Now, one last question that the Senator would like me to ask: Would you respond to requests to appear and testify before the duly authorized committee in the Senate when we need you?

Mr. JENSEN. Yes, indeed, Senator. As I've said, I think that is a responsibility of the Department and the deputy, and I would be pleased to do so.

Senator HATCH. Thank you. We will turn to Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. You know, Mr. Jensen, we have been extremely interested in the development of the plans on the sentencing commission, and we have talked about that in the past, and I think that is encouraging that we will have the announcement of the personnel before the end of the month.

As I understand, one of the provisions in the legislation is that the report of the Commission, initial report, is due in April 1986.

Do you think it will still be able to meet this deadline?

Mr. JENSEN. I believe they will. There is a great deal of work to be done. There is, however, a great body of knowledge with reference to this issue, and I am sure that when the Commission gets in place and gets its staff that they will take advantage of the amount of work that has already been done.

When the Commission does get in place to serve on a full-time basis, I am sure they will get to the task immediately.

I believe that they can meet the time kinds of constraints that are in the present statute. Of course, the Commission will have to look at that, and I am sure that they would respond to it as they get in place in terms of any need that they would have. If there is a need for extension of time, I am sure they will bring it to our attention. I don't think that that is necessary.

Senator KENNEDY. I don't know whether you are familiar with a letter that was written to the Attorney General on the *E.F. Hutton* case. There were some 15 Members of the Senate asking for explanation of the way the Department handled the case, including its decision not to bring the criminal charges against any individuals.

Do you know when we might expect an answer?

Senator HATCH. Could I interrupt for just a second? I forgot to announce that we will have a 10-minute rule—I think I took less than 10 minutes—so that everybody can question. And I didn't mean to interrupt you, Senator Kennedy, but I just think there is some concern as to how long we are each going to take.

Senator KENNEDY. OK.

Mr. JENSEN. Senator, I am familiar with the letter and the request for information. I would anticipate that a response will be submitted to that letter today or tomorrow—or maybe it will be the next day—but I am sure that there will be a timely response and that you could expect that in the very near future.

Senator KENNEDY. And could you give us any indication about how widespread is the activity involved in the *Hutton* case?

Mr. JENSEN. I wouldn't be able to do that in terms of any investigative activities, but it's the sort of thing that once you have looked at an issue of this nature obviously raises that question. We would look at that very carefully, but I would not be able to respond to it in terms of specifics.

Senator KENNEDY. Is there any undertaking to try to find out how widespread it is in the industry? And, if so, when do you think we would have some idea as to——

Mr. JENSEN. I couldn't give you a timeframe, but, as I say, that raises that issue and it will be monitored in the sense that we will look at that issue anew.

Senator KENNEDY. As you know, the Comprehensive Crime Control Act of 1984 contains a number of new tools to deal with white-collar crime.

Are you satisfied that you have the tools to do the job, or are we going to need to have additional tools to do the job?

Mr. JENSEN. The answer is, as it always is in these areas, yes and no. I think that the Crime Control Act was helpful. I may say, that in our response you will see that one of the features of the Crime Control Act was used for the first time in the *E.F. Hutton* case—that is the injunctive process. And we anticipate using that more.

That is not to say that we would not find areas of legislative change that would be helpful. As a matter of fact, I believe that there are such areas, and that we will be coming back to this Congress with some suggestions for legislative change.

Senator KENNEDY. On the RICO statute—as you know, on Monday, the committee will hold hearings on the civil provisions of the RICO Act. Is there anything you can tell us as a preview of the Department's position regarding the need to——

Mr. JENSEN. In a general sense, perhaps I could. The Department will appear and testify at the hearing on the 20th, and I would say at the outset, of course, that we were pleased that there is a general acceptance that the criminal RICO provisions have been instituted in a responsible way and are being very effectively used by the organized crime strike forces and the FBI—so we feel very good about that.

As far as civil RICO is concerned, what we will be testifying about is the use by the Government of civil RICO in that there is the ability to use civil RICO by the Government in some instances. We have not used it as much perhaps as we could have in the past. There is a learning curve that is involved there.

We have used it in the recent past very effectively, and we will point that out to the committee.

Insofar as private litigants use civil RICO, what we intend to do is try to summarize the history of that legislation as much as we can to give the committee a background of the issues that are involved. We do think there are significant issues to be resolved there.

There is a range of suggestions from removing that private-litigant remedy totally to leaving it alone or to some specific kinds of abilities to change it. We are going to suggest a number of areas as alternatives within that, based upon our assessment of its historical use and its historical use in the future.

Senator KENNEDY. The time is moving along. Let me move your attention to the issue of prison overcrowding. And as I understand that GAO has projected a prison overcrowding rate as high as 40 percent by 1990, twice the present level.

Could you give us any ideas that you might have how to deal with that? We know that this is an extremely important issue at the State level round the country, some States much more challenging than in others, but generally it is a very serious problem at the State level. It is also, I believe, significant at the Federal level.

Can you tell us anything that you might about how we might deal with it?

Mr. JENSEN. I may respond to this—it is a matter of great importance and significance to the criminal justice system, as you say, across the country, Federal and State.

One of the things that I think ought to be borne in mind here is that oftentimes we break the criminal justice system apart. We don't think of it as an area where portions of the system impact upon others, unfortunately, in this area.

What we have done over the recent past, federally and in the States, is in effect toughen our criminal justice stance. We have made mandatory penalties, we have moved to determinate sentencing, we have moved to situations where we would contemplate that there would be a higher level of imprisonment coming out of the system.

Well, the impact of that is that there needs to be adequate facilities. We think, one, you really do have to address the issue of building adequate facilities. That is being done at the Federal level; we are increasing Federal facilities at an unprecedented rate. And at the State level, we have done one thing that's important in terms of the kinds of things the Federal Government can do to help, is make available on a cost-free basis surplus properties and lands. That is a very significant problem for States in terms of their fiscal constraints in this area.

Senator KENNEDY. Of course, that is still going to be difficult in many of the urban areas where we don't have as much land as exists in the Western States, for example, and where there is a higher degree of need.

In general, the overcrowding issue is something we look forward to working with you on.

Mr. JENSEN. We certainly look forward to doing that. It is, as you say, I think a critical area of interest for the criminal justice system.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Kennedy. Have you voted already?

Senator SPECTER. I have not. May I say just a word or two?

Senator HATCH. Yes. I think we need to get over and vote. Senator Mathias is going to come right back, and I have asked him to just proceed with his questions while we go vote.

Go ahead, Senator.

Senator SPECTER. I simply wanted to say that I think Mr. Jensen's nomination is an outstanding one. I think we are very fortunate when there is someone presented who has such exemplary credentials and experience as does Mr. Jensen, who has served as an assistant district attorney, as district attorney, as Assistant U.S. Attorney General, and as Associate Attorney General. I have had the opportunity and pleasure to work with Mr. Jensen on a great many matters—the matter of prison overcrowding, the matter of violent crime and career criminals, and on civil rights issues.

And I want to say for the record that I think we are very fortunate indeed to have Mr. Jensen in the Department of Justice and moving into the position of Deputy Attorney General. Mr. Jensen, you and I have worked together over the years and have had a great many conversations privately, so it's not necessary for me to ask you questions to know your attitudes and your responses and how you will serve in your new position.

Now, if you would care to respond, Mr. Jensen, you are free to do so.

Mr. JENSEN. The only thing I can say is I appreciate your remarks very much, I thank you, and I look forward to working in the future with you.

Senator SPECTER. Very good.

Senator HATCH. We hope you have a lot more influence with Senator Specter than your predecessors had. I'm only kidding, Senator.

Senator SPECTER. And I hope I have more influence with you, Mr. Jensen.

Senator HATCH. Well, we expect you will have a lot of influence on each other.

Senator SPECTER. I think when Senator Hatch and Mr. Jensen and I sit down and talk, we will agree on most matters—not all matters—but most matters.

Senator HATCH. Well, I think so, too. I agree with what you have said, Senator.

Why don't we just recess until Senator Mathias gets back. He is coming right back, and he will start with his questions, and then we will go from there.

[Brief recess.]

Senator Mathias [presiding]. Mr Jensen, if you are ready, we might as well save some time.

Mr. Jensen. Certainly, Senator.

Senator Mathias. As I left the committee to go vote, Senator Kennedy was asking you some questions, and had raised the subject of the *E.F. Hutton* case. Since that subject has been opened up, we might pursue it a little bit.

I know that you are on record as having expressed concern about the subject of white-collar crime. In a letter to the House Judiciary Committee, you recently wrote that:

> White-collar crime is also costly from a social standpoint in that it promotes public cynicism concerning the fairness of our criminal justice system, because white-collar criminals, many of whom are relatively affluent, seem infrequently to be brought to justice.

And I think that is a statement with which I would associate myself. It is not an inappropriate statement to recall in connection with the *E.F. Hutton* case.

I am not sure that I understand all the facts of that case, and I would be glad to be corrected if I am wrong.

As I understand it, E.F. Hutton—and we are talking now of the corporation—pled guilty to 2,000 counts of mail and wire fraud arising from a check-kiting scheme. I hesitate saying scheme, but there's at least the appearance of a scheme.

The scheme involved at least $4 billion as the face amount of checks that were handled as part of the process—$4 billion. It went on for 19 months during 1980 and 1982, and it's estimated that it deprived the banks of about $8 million in interest income.

Is that roughly the scenario?

Mr. Jensen. Yes, Senator, that's correct.

Senator Mathias. E.F. Hutton agreed to make restitution.

Now, is that the $8 million in interest?

Mr. Jensen. Yes; that's the area where restitution is not a specifically known amount, but the projections are that it may be in that range. And they agreed to make restitution to anyone who would establish it, and they set up a process where that could be established.

And that general amount of money was projected.

Senator Mathias. So the question of restitution is open-ended at this point.

Mr. Jensen. In terms of specifics; it's not open-ended in terms of the process and in terms of their responsibility.

Senator Mathias. In terms of the dollar amount, however.

Mr. Jensen. Yes, that's correct.

Senator Mathias. They also have paid $3 million in fines and costs, or something in that order.

Mr. Jensen. They paid $2 million, which was the maximum that could be assessed under the pleas of guilty, and they also agreed to pay the cost of investigation, so the total was $2 million in fines and approximately $750,000 in investigative costs.

Senator Mathias. But, to date, no single individual has been charged with any crime.

Mr. Jensen. That's correct.

Senator **Mathias**. There was a quotation from assistant attorney general Stephen Trott that "one individual * * *"—and I am quoting what appeared in the press—"appeared to be the mastermind." Are you familiar with that——.

Mr. **Jensen**. I don't know if that's a correct quote, I don't know if that is what was said. I am not sure that there was any assessment that there was a single individual who was mastermind. No, I don't think that's correct.

Senator **Mathias**. Would you check with Mr. Trott and——.

Mr. **Jensen**. Certainly, that would be part of what we could respond. In our response I think we could deal with that.

Senator **Mathias**. In your response to what?

Mr. **Jensen**. That's the letter that was previously referred to that was——.

Senator **Mathias**. I'm not a part of that letter.

Mr. **Jensen**. Excuse me, but we would——.

Senator **Mathias**. I'm an independent operator on this.

Mr. **Jensen**. We would certainly see that you get a response also.

Senator **Mathias**. I would like to know what Mr. Trott said, and whether you feel that senior money management officials in the Hutton New York headquarters were involved in a personal way in the scheme.

Do you know if there were any written procedures that came to the attention of anyone within the Department of Justice with respect to this check-kiting scheme?

Mr. **Jensen**. I can't give you a specific response to that, Senator. I don't know that we would be able to respond to it in terms of the investigative process. We could certainly look at that.

Senator **Mathias**. You mean the Department doesn't know of any?

Mr. **Jensen**. No, I am saying that I don't know that I could give you a specific answer to that; it may be that there is material that could be made available in that area. Whatever material is in that area that we can make available, we would.

Senator **Mathias**. If you can.

Mr. **Jensen**. Yes, correct.

Senator **Mathias**. And the reasons you may be inhibited from making it available?

Mr. **Jensen**. Well, it may be that there is grand jury material that we couldn't make available, maybe that we don't have an assessment of that. But I would find out for you.

Senator **Mathias**. At least you could tell us, No. 1, if the Department knows of any written procedures, instructions, and then you can tell us, if you can, what it is or you can tell us why you can't tell us.

Mr. **Jensen**. That's correct.

Senator **Mathias**. We understand that about a 100 office branch managers participated in a greater or lesser degree in the operations of this scheme. And we also understand that compensation by Hutton for its branch managers includes some profit-sharing program. Are you aware of that?

Mr. **Jensen**. I believe that is correct in its general sense.

Senator **Mathias**. So they would have some personal interest in the level of profitability of the branch management operations.

Mr. **Jensen**. Insofar as their compensation is tied to that, certainly they would.

Senator **Mathias**. And that would include interest income, would it not?

Mr. **Jensen**. I do not know that answer, Senator; I don't know that there is any direct kind of relationship—but in terms of the general compensation arrangement within E.F. Hutton, it seems to be that that was the manner in which it was handled.

Senator **Mathias**. I would appreciate it if we could examine that question as part of the general response.

It would appear, then, that a lot of people are involved.

Mr. **Jensen**. That's correct.

Senator **Mathias**. Perhaps with knowledge, perhaps involved more deeply.

Mr. **Jensen**. That's right; at different levels obviously.

Senator **Mathias**. Different levels. Some of these people were granted immunity and some were not.

Mr. **Jensen**. I'm sure that's correct. There was not any general sort of immunity; there were specific instances where the investigation was carried out by grants of immunity, and it would include some of the persons you have outlined.

Senator **Mathias**. What was the general principle upon which immunity was granted to some and withheld from others?

Mr. **Jensen**. The general principle in terms of immunity, as I understand the investigative process, is that they got to the point where it was necessary in order to further the investigation. It's just like in any other instance where you have to make an assessment as to how you are going to further the investigation by granting or not granting immunity. That's what happened here in terms of any decision to do that.

Senator **Mathias**. Well, is it fair to say, then, that the Justice Department knew there was a scheme, they knew that it involved very large amounts of money, and they knew which individuals participated in the operation of the scheme?

Mr. **Jensen**. At the end of the investigation I think that that would be a correct assessment. Of course, what happens in any investigative process, one has to remember that it is really a continuum; and you start with levels of information and you probe and that's what took place here over a period of time. You have to learn about this over a period of time. We didn't know all the dimensions of this until we were through.

Senator **Mathias**. But it is now known by the Department.

Mr. **Jensen**. I think it's important to say, as you say, that there is a conclusion at the end; that's why we brought the indictment, that's why the case was concluded in that fashion.

But to say that we knew that at the instant that it started——

Senator **Mathias**. That's not my question, obviously. In life we learn all too slowly.

Mr. **Jensen**. That's correct.

Senator **Mathias**. We become wise much too late. But we do know that there were individuals who were involved—some got immunity, some didn't. Some benefited personally, some may not have.

Some of the people who participated and profited may not have been granted immunity, isn't that true?

Mr. JENSEN. I don't know the specific assessments in that regard. I know that in the assessment of how the case ought to be ultimately handled, all those issues were gone through in terms of potential for supporting any charges either individually or corporately. And the balance was made at the end when we had all the information as to what would be the appropriate way to handle it.

Senator HATCH [presiding]. Senator, your time has expired.

Senator MATHIAS. Let me just complete this segment of questions. Could you advise us whether there are individuals who are known by the Department to have participated, who have not been granted immunity?

Mr. JENSEN. Oh, I am sure there are levels of participation. For me to say that they reached the point in terms of specific information about a specific individual, that a charge decision was made, I don't know that. So that it would have to be gone back over in terms of any specific——

Senator MATHIAS. That's what I am asking you to do. Thank you.

Senator HATCH. Senator Simon.

Senator SIMON. I understand there has been some discussion of the *E.F. Hutton* case. First of all, let me just say I hear nothing but good things about you, Mr. Jensen. I may be talking to the wrong people, but that's what I hear. [Laughter.]

Mr. JENSEN. Well, I don't think so.

Senator SIMON. I share the concern that I gather may have been expressed here on the *E.F. Hutton* case. I don't think we can have dual standards of justice in this country. And I think the impression with the public is that if you rob a service station of $25, you are going to be put into prison; but if you are with a big brokerage firm and steal millions of dollars, nobody is going to do anything to you.

And I think clearly that is not an acceptable situation.

So I would simply underscore my concern—not only about the substance of the law, which obviously you have to deal with, but the image that we are projecting to people on the evenhandedness of the law.

Mr. JENSEN. Thank you, Senator. I do not disagree with anything you have said, and I think that it is a very important kind of consideration that we have the perceptions of justice and the way in which we handle any area of criminal justice is not only fair but perceived to be so.

One of the difficulties in white-collar crime has been some level of differentiation—and we don't agree with that. We think that white-collar crime does reach the level where it ought to be ferreted out and punished specifically. I think there has been too often a failure to do that. We don't agree with that.

I don't think that is what is involved except in terms of the concern for Hutton, and we are concerned that that is the kind of perception. We would hope that we would allay that, because it is not our perception that we ought not to bring individual charges. We have to make case-by-case decisions, and we make them in such a way that we believe that they are justified within the circumstances of handling that case. That is precisely the way we think the *Hutton* case was handled.

But we are concerned that we correct any misperception that we are going to treat white-collar crime in some different and more lenient fashion.

Senator SIMON. Thank you. Thank you, Mr. Chairman.

Senator HATCH. Thank you.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. Mr. Jensen, I would like to first of all congratulate you on your nomination and the challenge that you are accepting in your continued service to the people. And, as you would probably expect me to do today in the questioning during a confirmation hearing when, we want to know how things are going to be different or better, to ask you some of those things that we have visited about in the past, like access to information and the *General Dynamics* case.

And first of all, in regard to general response, I would like to know what you could do, from the position of deputy attorney general, to better facilitate congressional access to information from the Department of Justice. Or do you have the opinion that the Department is currently as responsive as it needs to be to the Congress?

Mr. JENSEN. Well, I would hope once again that we not only have a situation where we are really responsive, but that it also is a shared perception that that is our purpose. As I have indicated, I think I have attempted to work with this committee particularly in such a fashion that we are responsive. We do have, of course, levels of constraint that we hope would be mutually understood, and if there are any areas where we need to reach an accord in terms of our mutual responsibilities—that's the kind of thing I would hope we would be able to work out, because we want to be responsive to this committee, but we also want to be in such a way that we maintain our responsibilities, particularly with reference to investigations, as you know.

Senator GRASSLEY. I would like to give a couple of examples, of DOJ's responsiveness * * * or unresponsiveness. Quite frankly, there were answers to these two letters hand-delivered to my office this morning—but a couple of examples: A letter I wrote on February 13—that's 3 months ago—and one on March 18—that's 2 months ago—in which I asked for just very simple information—I even had an opportunity 1 month ago to speak to Mr. Meese himself about these—and I just use these as two examples of where I guess I have difficulty in agreeing with you that there has been adequate cooperation in regard to getting information to the Congress. I would only point that out and take you at your word that examples like this maybe won't be repeated, and that we will get the information we request a little more timely.

If it were more complicated, I guess I couldn't say what I just said, but it was relatively simple information that we were requesting.

On another point—in your current position as associate attorney general, you have oversight of the criminal division and the Bureaus, including the FBI, is that correct?

Mr. JENSEN. That's correct, Senator.

Senator **Grassley**. In that capacity, did you play any direct or indirect part in the order given to FBI Agent James Cavanaugh not to testify and not to testify even about FBI policy when he was subpoenaed to testify last month before the House Energy and Commerce Committee?

Mr. **Jensen**. I was aware of that, but the direct kind of response to that by the Federal Bureau of Investigation. I was aware of that and I agree with their response.

Senator **Grassley**. You were aware of it?

Mr. **Jensen**. Yes.

Senator **Grassley**. But it was, in other words——

Mr. **Jensen**. The decision was made by the FBI, and there was no need for any further decision.

Senator **Grassley**. Just to clarify, Agent Cavanaugh was to testify regarding his role in an investigation of the alleged fraudulent overcharges by Pratt and Whitney.

Why would the Justice Department notify Mr. Cavanaugh just 1 hour before the hearing that he was prohibited from discussing any matters relating to the investigation, or even discussing FBI policy? And, if that was so, under what legal authority was the direction made?

Mr. **Jensen**. There would be two issues there, Senator, if I may. One would be the issue of FBI policy, and obviously that should be addressed by the Director of persons designated by him, not by specific agents. And I am sure that the Director or anyone within that headquarters level would be happy to respond to policy-level issues.

As far as the specific investigation, the issue is one of the fact that that is an ongoing pending investigation, and it would not be available for the agent to discuss the issues of the pending investigation.

Senator **Grassley**. Well, Cavanaugh made clear—well, I shouldn't say he made clear, but he at least testified that the Department of Justice was the agency making the order and not the FBI.

Mr. **Jensen**. The FBI is the Department of Justice. I think sometimes we get into a problem there. The FBI is a part of the Department of Justice; the Director reports to the Attorney General—and sometimes perhaps that is confused.

In this instance, the agent that was summoned is in the FBI within their supervision, and they handled that particular aspect of the request. But that is the Department of Justice speaking in that sense when the FBI does that.

Senator **Grassley**. But you are citing policy, and my question was what the legal authority was for that directive.

Mr. **Jensen**. Well, in terms of the agent's legal authority to discuss, for example, grand jury investigative materials, he would not have the authority to do that. And in terms of the directives to the agent, in terms of his responsibility within the FBI, he is not to discuss pending investigations.

Senator **Grassley**. Well, what about the policy itself, the policy?

Mr. **Jensen**. Then that should be addressed, I say, by the Department of Justice, Director Webster, by the Attorney General, by myself, if that is what we would like to discuss. That is why I say that policy-level issues ought to be addressed by policy people and not by the investigative agent.

Senator **GRASSLEY**. Well, too often, you know, we run into lack of information because it's policy as opposed to legal authority, and now when we are talking about policy, then it's the level in which we get the answer, that we can't get the information we want.

But I guess I will go on to another point, because I don't think at this point there's any benefit in belaboring that—but I thank you for your answer, even though I think that I disagree with the answer.

Now, it's been 9 months since we asked DOJ to comply with my subcommittee, which is the Administrative Practices Subcommittee, subpoena for Justice Department files relating to its first investigation of General Dynamics. And we requested 63 documents. Two weeks ago, after several meetings with Mr. Meese, the subcommittee received 17 of those 63 documents.

Can you tell me why the Department has refused to turn over the other 46 documents?

Mr. **JENSEN**. Well, as you point out, that's been an ongoing process, and there are two basic reasons. Some of those documents are within the proscriptions of rule 6(e) that governs grand-jury process; in other areas, documents refer to pending investigation items and they would be withheld because they are part of the integrity of the pending investigation.

Senator **GRASSLEY**. Well, assuming those 46 documents are related to an ongoing investigation, I can't help but ask how our access to those documents through a confidential arrangement, as the subcommittee has offered repeatedly, and you were involved with one of those meetings in my office—how would our controlled access to those documents harm the ongoing investigation?

Mr. **JENSEN**. The point where we met we talked about any kind of way in which we could provide an adequate briefing to you and your staff as to what was going on in that investigation without the provision of specific documents that would then be out of the control of the investigation. We would be happy to do that, and we have attempted to do that so that you could be kept abreast of the activities that would be a part of the overall investigative process without getting into the specifics of informants or witnesses or of getting into the process of the investigation in such a way that it might impede its integrity.

Senator **GRASSLEY**. Well, I want to take you up on that offer, so I will follow up on that.

I would, though, like to—in regard to whether or not our involvement would somehow inhibit the investigation, I would like to point to a news report—I ought to give for the record, this is a May 3, 1985, news report in the Providence Journal Bulletin, in which Mr. Davis Lewis, chairman of the board of General Dynamics, said "No General Dynamics employees have been questioned before the grand jury on the original alleged false claims." That is what we were initially primarily told that the investigation was pursuing. The original false claims investigation happens to be the material that we subpoenaed, and it all dates prior to 1982. And from the standpoint of not getting more documents than the 17, I fail to understand how the material that we have been denied is related to the ongoing case when the grand jury isn't even considering the issue we are.

Senator **Hatch**. Senator, your time has expired.

Senator **Grassley**. I will wait, then, for further questions.

Is that what I should do?

Senator **Hatch**. Well, if you want to finish the question, I would be happy to have you do that.

Senator **Grassley**. I'll wait.

Senator **Hatch**. OK. Senator McConnell.

Senator **McConnell**. Thank you, Mr. Chairman. Mr. Jensen, do you favor the administration's proposal to eliminate funding for the Office of Juvenile Justice and Delinquency Prevention?

Mr. **Jensen**. That has been a part of the proposals over several years, Senator. I know of your specific interest in this area. And I would like to say that the issue in terms of the funds is one that needs to be put into a context, and that is, that we are not saying that we should withdraw funding from research and development in the area of juvenile justice. We think that the specific program, however, is better subsumed under the Office of Justice Programs as a total issue, and that we would see that the kinds of efforts that are now in OJJDP as a specific entity can be taken and handled in a responsible fashion in the Office of Justice Programs in an overall entity. So we are not withdrawing funds for the conceptual area; we are withdrawing them for that structure, that's all.

Senator **McConnell**. Doesn't that create, though, a whole lot of additional problems in terms of the network out in the country particularly interested in juvenile issues?

Mr. **Jensen**. I don't know that it would; it could have an impact upon that. It may be put into a situation where I suppose there is another level of competition for funds. I think that's correct.

But we really think that's an appropriate way of putting it into the overall criminal justice criminal research program.

Senator **McConnell**. Well, if the administration is indeed interested in research in this area, I am wondering—I notice that OJJDP recently announced its proposed priorities for awards of grants and contracts under the Missing Children's Assistance Act for this current fiscal year that we are in right now.

Those priorities won't be final before mid-July at the earliest, and I'm wondering how the administration can justify this kind of delay, since the funds were appropriated so long ago. The proposed priorities, according to my notes, weren't even published until May 10 of this year. And the entire publication consists of two columns in the Federal Register.

Now, if we are seriously concerned about and interested in the problems of juvenile delinquency and the problems of young people in this country, why did it take us all this time to even get ready to establish the priorities for awards of grants and contracts under the Missing Children's Assistance Act?

Mr. **Jensen**. The easy answer, I guess, is that they do take time. That Missing Children's Act, of course, was just enacted last year in a specific sense, and I don't know why it took any specific time—perhaps that is longer than it should have taken.

But it was developed in response to the new legislation on missing children. So I think it was addressed in a fashion that was responsible and moving forward with it. Perhaps it could have been more expeditious. But it doesn't really reflect upon our basic kind of conceptual concern for this area. We get those out to respond to the new funding, the new legislation, as best we can.

Senator McConnell. Well, my concern is—as you know, we have discussed this on several occasions before—the hearings before our Subcommittee on Juvenile Justice indicate that a growing number of children are committing suicide, committing arson; the number of children engaged in delinquency continues to go up—and the whole perception of the administration in this area I think is really dismal.

And I am concerned about it, as someone who is committed to the success of the administration, in terms of the appearance of it. We say the right things occasionally, but the actions, it seems to me, don't tend to back that up.

And I hope that in your new position you might be willing to take another look at this whole area of funding for juvenile programs, because I am concerned about not only the appearance of what the administration appears to be doing in this area, but, as I indicated in the case of these grants, I am concerned about the reality of what we do as well.

Mr. Jensen. I agree with that. I would in a way disagree; I think we have given a good deal of attention to an area that had been unattended before. I think that we have done a lot in terms of raising the consciousness of how there are responsibilities, both at the Federal level and the State and local levels, and we have done a good deal in that respect, I believe.

Never can you say that you can rest upon that—and, as you know, Senator, I think we have some new, very, very interesting looks that are coming in terms of partnerships that the President has announced, and I would hope that that is a vehicle to do precisely what you say, that we can look at——

Senator McConnell. Well, as a member of that, I intend to be heavily involved. I didn't mean that as a universal condemnation of the administration—certainly the President deserves a lot of credit for the Missing Children's Act, the initial one in 1982, the Missing Children's Assistance Act last year.

I just don't like every year the Department coming forward with a proposal to zero out OJDDP; I really think it sends the wrong message. And if we really are interested across the board in these kinds of programs, I think it's better not to take that approach. And I just wanted to once again express my opinion with reference to that issue.

Mr. Jensen. I thank you. I would hope that we would not be sending the wrong signal, because we are not functionally withdrawing from that area.

Senator McConnell. Thank you very much.

Senator Hatch. Thank you, Senator. I might point out, in light of the recent thrust of questioning, I would note that the crime control legislation which we passed into law last year, for which Mr. Jensen was so responsible, contains numerous white-collar crime proposals or provisions. The bill is not directed solely toward violent-crime issues; rather there are numerous reforms designed to enable the Federal Government to more effectively fight and combat high level fraud and other white-collar criminal activity.

I believe this is clearly a priority with you, Mr. Jensen, as evidenced by this landmark legislation. I just want to point that out for the record at this point.

Mr. JENSEN. Thank you, Senator.

Senator HATCH. Let's turn again to Senator Mathias.

Senator MATHIAS. Thank you very much. Mr. Jensen, I am sure it's not the most happy thing for you to have to talk about all of the sins of the Department when we are up here primarily to talk about your virtues. But these renomination proceedings do give us an opportunity to have a little oversight exercise.

Mr. JENSEN. I appreciate that, Senator—I recognize that.

Senator MATHIAS. When we broke off, we were talking about E.F. Hutton and the fact that none of the individuals who participated in some degree and who have not been granted immunity have been indicted or charged.

Why did the Justice Department not bring any charges or indictments?

Mr. JENSEN. I may say, as a general situation, whenever you are dealing with areas where there is, under our legal framework, the ability to bring criminal charges against corporate entities or business entities, and you also have the issue of whether or not charges can be brought individually, that's a generic thing; it happens in these kinds of investigations.

And, as you can see, there are instances where we have investigations where only individuals are charged, sometimes where the business entity, the corporate entity, is charged as well as individuals, and others we charge just the corporation.

And it's one that depends upon the specifics of an investigation, the specifics of the information that is available to us, and our best judgment, our best professional judgment. That's what happened here.

The judgment here was that the disposition that was available, as you have described, where the plea to 2,000 counts, which is the largest charged indictment in this kind of a case in the country's history—the injunctive process that was available, the restitution that was available, and the immediacy of the result in terms of its impact upon financial institutions, impact in terms of the deterrence for this kind of conduct in a general sense, were all available through the disposition that we made in our professional judgment; they would not have been available had we brought other charges individually.

Senator MATHIAS. However, in the days when I carried the title of assistant attorney general, I occasionally had to deal with matters of this kind, and the two concepts are not mutually exclusive.

Mr. JENSEN. No; they are not. As I say, there are any number of instances where we bring charges both against the corporation and individuals. And the assessment has to be made within any given case.

As I say, this case had a disposition that had been worked at very assiduously. We think it was a tremendously favorable disposition in many respects. Part of the balance was that there would be no charges brought against specific individuals. That was a judgment, and we feel it was a proper judgment.

Senator **Mathias**. Was that a judgment in which you participated?

Mr. **Jensen**. I didn't participate directly; it was a judgment—in terms of the way this case was handled, was by an assistant U.S. attorney in Pennsylvania, Mr. Murray, who was really basically responsible for its investigative progress, and then we had our fraud section, run by Mr. Ogren, who is the head of that—a very, very experienced white-collar crime investigator—and specifically managed within our criminal division.

The specific decisions in that regard were made in the criminal division and with the fraud section and with the U.S. attorney's office. I was aware of it, but did not participate in that direct, specific fashion. But I was aware and approved of the final disposition.

Senator **Mathias**. Did E.F. Hutton make it a condition of its plea that no individuals be indicted?

Mr. **Jensen**. I don't know exactly what the discussions were in that regard. My understanding is that this disposition could not have been arrived at other than as it was.

Senator **Mathias**. Well, then I am left to conclude that there was at least some understanding that E.F. Hutton would not have pled guilty——

Mr. **Jensen**. Or that we would not have been able to conclude the matter if there had been additional individuals charged, or if individuals had been charged.

Senator **Mathias**. So that the disposition of the case that was achieved would not have been available if individual prosecutions had been sought?

Mr. **Jensen**. It is the functional result of that; we would not be able to have reached this at this time.

Senator **Mathias**. Nothing would have precluded the Department from going forward with a criminal case.

Mr. **Jensen**. It could have gone forward; it could have gone forward in a different fashion, that's correct.

Senator **Mathias**. Can you tell me—perhaps not out of your immediate current knowledge, but can you advise the committee how many check-kiting cases have been brought, how many indictments have been obtained for check-kiting, and how many convictions have been obtained in, say, the last 5 years?

Mr. **Jensen**. We can go back and see. I am not exactly sure what would be available in terms of those records. I am sure we would have something that would respond to that.

In this regard, I know there have been some briefings with reference specifically to *E.F. Hutton*, and there are going to be some more, so we would be happy now to make those briefings as comprehensive as possible, so we could cover those kinds of issues.

Senator **Mathias**. Who's going to get briefed?

Mr. **Jensen**. I believe your staff is, and other staffs here have been briefed on this.

Senator **Mathias**. One of the reasons that has been cited by some people at Justice for not wanting to go after individuals was that it would take years to prosecute. Was that a significant factor as far as——

Mr. **Jensen**. It may have been in this kind of a case. I don't know that you can ever say exactly how long it's going to take, but if you look at this kind of a case against any specific individual, there is no question that it would be an extended prosecution. It's a very complex kind of issue; it involves a lot of documentation and presentation. So I don't think there is any question but that it would have been an extended trial.

So that I think that that is a consideration in terms of your ability to get this done in a fashion that is essentially expeditious.

Senator **Mathias**. Of course, that wouldn't be unique?

Mr. **Jensen**. No.

Senator **Mathias**. You are still fiddling around with *Abscam* cases 5 years after the event.

Mr. **Jensen**. I understand that.

Senator **Mathias**. And I am not suggesting that that is not desirable, but it hasn't been a bar to prosecution.

Mr. **Jensen**. Well, you can't say that this is going to take too long to get there; it is something, however, that gets into the mix in terms of deciding that when you do have a disposition that is available that can be achieved in the near term, that is the kind of thing you put into the balance.

Senator **Mathias**. The Attorney General was quoted in a publication called The American Banker—I believe it was on the 3rd of May—as saying that it would not have been fair to prosecute some and not all.

Would that have been the standard?

Mr. **Jensen**. Well, I'm sure that there was a consideration made of the entire potential for charging, and some of them could not have been charged as a result—and I am not sure the balance in terms of level of culpability, that kind of decision would be in that balancing decisional mix.

I think that that responds to it in the sense that I don't know what that whole assessment was, but you do find situations where there are different levels of culpability, and when you are making a decision as to whether or not you can bring a charge that is borne in mind.

Senator **Mathias**. Of course, that involves a definition of what is "some" and what is "all."

Mr. **Jensen**. Yes; that's correct.

Senator **Mathias**. If "all" includes everybody who has kited a check in the United States, it widens it quite a bit.

Mr. **Jensen**. Well, I don't think that was made in that context; I think it was made in the context of *E.F. Hutton*.

Senator **Mathias**. No, but that is the context in which I asked you a minute ago how many indictments there had been for check-kiting and how many convictions for check-kiting, because I think it does raise that question.

Mr. **Jensen**. In terms of the overall implementation and enforcement of the law I think that that is correct.

Senator **Mathias**. Would you apply that standard to people who are drug traffickers? If you can't indict them all, you don't indict any of them.

Mr. **Jensen**. No; obviously we would not have a situation where you say you are going to forgo any indictments. If that were the case, I think we would just have to sort of shut the whole thing down tomorrow.

Senator **Mathias**. So that that was not an operative factor.

Mr. **Jensen**. I don't know how much it was within the *E.F. Hutton* thing. As I say, we don't have any situation where we say we are going to forgo prosecutions in a generic sense because of the inability to make every case that is existing in the country.

Senator **Mathias**. And the immunity question really isn't pertinent here as to who gets prosecuted.

Mr. **Jensen**. Well, it does in the sense that we, as I said, in the continuing investigations, as you are trying to describe and find out what the actual event, the potential criminal event, is, it may be that one grants immunity in order to accomplish that. And after you have done that, then the particular individual has been immunized.

Senator **Mathias**. But the hope in granting immunity, my observation has been, is that you lure the little fish in the hope that the little fish, in return for a grant of immunity, is going to take you to the kingfish.

Senator **Hatch**. Senator, your time has expired.

Mr. **Jensen**. I think that's basically correct; it may vary from time to time, and you may find that's the only investigative opportunity you have. But, by and large, I think you are right.

Senator **Mathias**. But this depends to a degree on what you tell us about what Stephen Trott meant when he referred to "the mastermind." The mastermind was the kingfish.

Why did the kingfish get away?

Mr. **Jensen**. As I say, I don't know that that is the appropriate characterization of this instance We will look at that.

Senator **Mathias**. Well, I will hang breathless upon receipt of your response to that question. And I will await the time for my next round of questions.

Senator **Hatch**. Senator Biden?

Senator **Biden**. Thank you very much. I apologize, Mr. Jensen—we are holding joint hearings with this committee and the Judiciary Committee upstairs on drug issues, and because I not only respect the Senator from Maryland, but was planning on pursuing the same line of questions, I will yield my time to the Senator from Maryland to pursue his line of questioning.

Senator **Hatch**. Fine. Let me, before you do that, mention that Senator Thurmond—whom I saw at the last vote is very supportive of your candidacy. He is in a markup; that's why he can't be here. He is excused for that reason. Otherwise he would be here and hear this proceeding.

Mr. **Jensen**. Thank you very much, and I would extend my appreciation to Senator Thurmond for those remarks.

Senator **Biden**. I would like to pursue this area. Now, if the Senator from Maryland has questions to continue on, I would rather than break the continuity, let him take as much of my time.

And let me make only one prefacing comment. One of the areas that I am speaking with the Chairman, Mr. Jensen—and I plan on supporting your nomination and I think you will be a fine addition and I look forward to working with you. But you should be aware, at least on the Democratic side of the aisle, that we have a mounting concern about the inability or the unwillingness or the lack of fervor with which it appears, from our perspective, from my perspective, there is a pursuit of major white-collar criminals.

The E.F. Hutton people—somebody should be in jail—for a long time. Somebody should be in jail for a long time. Somebody should be in jail at General Electric—somebody should be in jail. Those two fraud matters exceeded anything that I can recall in the last 5 years in terms of their consequence on the Hill, since I have been here.

Now, something went awry—and I would just make this one general comment. And that is that even if there is the risk that one might lose, I would respectfully suggest to you that respect for the law suffers immensely when the public reads that you have a billion-dollar kiting scheme going on, and nobody is prosecuted; when you have multimillion-dollar fraud taking place in one of America's great companies—and nobody is being prosecuted. And the same time that goes on, we put in jail in the District of Columbia, through the Attorney General's Office, a woman for 30 days who steals, shoplifts, two sweaters.

Now, that is something that undermines the credibility of the law. And as Jerome Frank once said, "Law is only what people think it is. It is a judicial myth that must be perpetrated."

And right now I would respectfully suggest to you that even if you would have difficulty making a case, it's better to demonstrate that the Government is pursuing someone, even if you are likely to lose, if you think there is reason there, than it is not to pursue it and allow what's happening in the minds of the public. More damage was done by the *E.F. Hutton* case and the *General Electric* case than anything that has taken place in my view in the last 4 years to bring about an increasing disregard for the law.

How in hell do we go out there and go around to the schools and go around to the colleges and talk about drug interdiction and talk about people should be going to jail for drunk driving and marijuana and cocaine, and tell these young kids who have little respect for the law to begin with: by the way, if you are E.F. Hutton, you can kite a billion bucks and, yoo-hoo, nice being with you, pay a fine—it doesn't hurt you at all; if you are General Electric, you can pay a fine, and, sorry, case was too hard to make.

I really tell you, Mr. Jensen—obviously you can tell I'm upset about it. And, by the way, other administrations have done the same thing, this is not new. But I really think for an administration that is as politically astute as this one, more is done to undermine the credibility of the judicial system, more is done to undermine the notion that there is equitable application of the law by these two cases than anything I can think of.

I think it's a travesty.

Anyway, with the next 2 minutes I have, I will yield to specific questions to the Senator from Maryland.

Senator Mathias. Well, we were just touching, Joe, upon the fact that somebody did go to jail, and I have asked to have the record for the last 5 years of people who have been sent to jail who have been indicted and convicted of check-kiting.

But none of them at E.F. Hutton.

Senator **Biden**. A lot of them went to jail. I can name eight of my clients that went to jail when I was a lawyer for kiting. I can name them. I defended them.

Senator **Mathias**. You are not called upon to make that act of immolation.

Senator **Biden**. I was as a defense lawyer; I did my duty under the Constitution to defend them. They went to jail, and they didn't even do one one-hundredth of one-tenth percent of what they did at E.F. Hutton. They should be excoriated; they should be pilloried in the public for what the hell they did. It is outrageous.

And I am told by people—and I am pursuing this independently, I say to my friend from Maryland—I am told by friends on the street that the word on the street is—Wall Street—that one of the reasons they didn't pursue it is because everybody does it up there.

I don't have any notion whether that's true.

Mr. **Jensen**. It would seem to be on its face not true. It was pursued; it was a very, very vigorous investigation and prosecution. There was nothing that was backed off from in that at all. I think we have gone into it before. We certainly should discuss about the judgments and about those concerns.

But there was no hesitancy to go after them.

Senator **Biden**. No hesitancy about E.F. Hutton, but are you——

Mr. **Jensen**. We would go after anyone that we could make a case on.

Senator **Biden**. And the reason we are able to make the case is because some little upstate bank decided that they weren't going to be part of it, that they figured out that they were being had.

Now, that's not your responsibility. I am not suggesting the failure to nail E.F. Hutton earlier has anything to do with Justice. I am not saying that; I am only talking about one thing. Once it was clear what was happening, what had happened, the lack of political sensitivity that resulted in, in fact, nothing more than fines being pursued I would argue is an incredibly negligent political judgment. I am not saying you did anything wrong in the law. But I think you have unintentionally undermined the process so much, you can't believe what you hear out there. I mean, people are going off the wall.

And I am supposed to go around and talk about tougher drunk-driving laws? We are putting people in jail in my State for a minimum 30 days, the second time 1 year, drunk driving, and you can go out and steal a couple of billion bucks and it's like, yoo-hoo, see you around at the club. Really, Lowell, it's a bad job.

Mr. **Jensen**. I understand what you are saying. There are a lot of misperceptions out there, and I think it's unfortunate that often we have to deal in perceptions, and I think you are making a very specific and cogent point about that, but I think there are real misperceptions about that in terms of what really happened and in terms of——

Senator **Biden**. In your new capacity, when we confirm you, would you, assuming the chairman is willing to agree to my request, would you be willing, Justice, to come up here to have a hearing and explain in detail, lay out for us, the *General Electric* and the *E.F. Hutton* cases?

Mr. JENSEN. We have already started to do that—we would do it. And there are some areas obviously—in General Electric, for example, there are other charges there of individuals, and we could not discuss that. There is a time when we could, when we would be happy——

Senator BIDEN. We understand. Well, I appreciate that, and I appreciate the indulgency of my colleague. My 4-year-old daughter might suggest to the Senator from Maryland that her daddy is an Indian giver: I gave my 10 minutes and now—I guess I shouldn't say that either, I'll get in trouble for somehow being something or other—anyway, I better shut up. [Laughter.]

Senator HATCH. I won't comment on that.

Senator BIDEN. You have another minute or two, Senator—go ahead.

Senator HATCH. Senator Mathias.

Senator MATHIAS. We were just exploring, when you came in, the question of why we give immunity to small figures on the scene. Stephen Trott says there was a mastermind at E.F. Hutton. Now, Mr. Jensen says he doesn't know anything about that; he's going to tell us about what Stephen Trott had in mind.

But if there was a mastermind, the purpose of giving immunity to a few of the small fry is to lead you to that mastermind. And it is disturbing that no one in fact has been charged with anything, except the corporation, which can well afford to pay the relatively small amounts that they have been assessed.

Senator BIDEN. Any other time that you would like me to yield to you, let me know.

Senator MATHIAS. I am a patient man; I will wait for my next turn.

Senator HATCH. Senator Grassley.

Senator GRASSLEY. Senator Biden, some of the points I have been trying to make on General Dynamics, you have made in the area of non-defense white-collar wrongdoing, and I had left off with some questioning of Mr. Jensen in regard to General Dynamics.

I would like to go back to the point that I was attempting to make when my time ran out. And that is that the subcommittee wants access to just the pre-1982 documents relating to Justice's investigation of General Dynamics; and, of course, we have had some exchange under what conditions or lack of conditions the Department won't turn over those documents, and it's mostly that they won't turn them over because it claims the case has been re-opened on that issue.

So I had a newspaper article here that demonstrates that we have reports the grand jury is not considering the original false claims issues that we originally thought were being investigated.

So my question is: why, then, can't we have those files, since they are closed on that issue, according to this report?

Mr. JENSEN. Well, as you know, Senator, I would not be able to tell you of the specifics of the grand jury investigation under way, so that I would not be able to respond to the supposed assessment of what that activity is.

All I am saying—and what we have said with reference to this case is that we are happy to provide those areas of the information in this case and related cases where it is truly closed. If it has been re-opened, it is part of a pending investigation, we have made that position clear that we would not make that available.

I am not going to comment on what other people characterize the investigation—I can't do that. But all I can say is that our assessment is precisely as you say. If it is a closed case, we can provide it; if it is not a closed case, we cannot.

And that is our assessment of this situation.

Senator GRASSLEY. Well, remember that you had referred to 6(e), and I want to make clear for the record that we have never asked for 6(e) documents—I want to make that clear.

Were you the individual, Mr. Jensen, who had the final say on declining to prosecute General Dynamics in December of 1981?

Mr. JENSEN. In the Department, yes.

Senator GRASSLEY. During its initial investigation, DOJ had access to documents showing that General Dynamics operated under three sets of books: one, the very optimistic outlook they gave to the Navy Department; the even more optimistic outlook that they gave to their stockholders; and then their own internal books.

And these showed that GD intentionally brought in to its second submarine contract with the Navy and made up for that low-ball bid through later claims.

In light of this evidence, can you tell me why you signed off on the closing of the case?

Mr. JENSEN. I am not going to be able to go into the specific evidence, given the instance of the re-opening of that investigation. At the time it was closed off, as is indicated by that record—it was closed off because of the state of the law and the facts known to us at that time.

Senator GRASSLEY. Let's suppose that I agreed with you—you know, part of our reason for asking for information in our oversight capacity is that I would like to be as sure of that evaluation as you are; hence our requests for the information.

Justice has said that the problems encountered during its first investigation of General Dynamics have been solved by its special fraud unit set up to conduct what they refer to as nationally significant fraud prosecutions in the defense industry.

In nearly 3 years of operation, however, this unit, which was designed to send a loud crack-down message to the industry—and this industry has taken in over $250 billion of procurement money—that's $250 billion of taxpayers' money—after 3 years this special unit has produced less than $4½ million—million, not billion—in fines and restitution, and all jail sentences have totaled just 7 years and 31 days.

Now, do you think that the $250 billion defense procurement industry has been scared into compliance with the law because of the fraud unit's activities?

Mr. JENSEN. I don't know what level of compliance has been stimulated by that. The only thing I can say is that as a result of our experiences in this whole area of investigation, it became clear, as far as I was concerned, and the people in the Department who dealt with this, that we ought to put together a special unit that would develop expertise and would stimulate our activities in this area. That is why that unit was put together.

I don't think it solves anything; I think it moves forward. And I think that the unit has started to stimulate learning and knowledge and prosecutions in other U.S. attorney's offices, and they have handled them themselves.

I think that the unit is the kind of a special effort that we ought to put for a special problem. I don't think that it is in and of itself going to—certainly not instantaneously—solve that whole problem. It's going to take a long time and a lot of effort.

Senator **Grassley**. Well, I think the signals we send are pretty important, and the faster we move in that area the better.

And in regard to that, defense inspector general Joe Sherrick [phonetic] testified last month before Congress that his office spends an inordinate amount of time trying to persuade prosecutors to prosecute defense fraud cases; he also said his people haven't had much luck in trying to do that, and that many, many cases go unprosecuted.

So I would like to ask you what you can do as deputy attorney general to ensure that U.S. attorneys and justice prosecutors will aggressively pursue defense fraud cases. Now, this will be in your new capacity.

Mr. **Jensen**. Well, we have dealt extensively with Mr. Sherrick, and I think we have over a period of time, since he has taken on those new duties, worked very, very assiduously with him.

I don't know that there is any inordinate time. This is not an easy process. And as we take the investigative product and decide what can be done with it, well, we work with Mr. Sherrick and his investigators over a period of time. We would attempt to improve that all the time. There is always an information flow and an ability to move these cases that has to be addressed, and that is what we are doing with that unit.

As far as the Department itself is concerned, I think what we have tried to do is also raise the level of U.S. attorney involvement and interest through a departmentwide council on economic crime. And we just recently had a session where the attorney general was there and did precisely the kind of signaling that you would like to be done, and that is that this is a high level for this attorney general. I think it was the kind of a signal that we need within the Department, and I think it was most appropriate and I think it will be effective.

Senator **Grassley**. Well, along that line, I think that my point would be repetitive if I said anything different, and refer to what Senator Biden and Senator Mathias have said in regard to the cases that they were referring to. I guess I would just urge my colleagues on the committee—I would like to emphasize that I think the Department of Justice can step up its activity and its aggressiveness in the defense fraud area, because I think one of these days we will just have to acknowledge the magnitude of this problem and the fact that band-aids aren't going to solve the problem.

Mr. Chairman, I am done with my questions.

Senator **Hatch**. Thank you. We will then finish up with Senator Mathias.

Senator, I believe you are the last one to question. If you could finish up the hearing, I would appreciate it.

Senator MATHIAS. Why don't I go and vote while you do whatever you would like to do, and I will be back as soon as I have voted.

Senator HATCH. That will be fine. Let me state for the record that Senator Biden has submitted several written questions to you, Lowell, which will require a written response. These questions deal principally in the area of drug enforcement activities of the Justice Department.

I think we will also keep the record open till 6 o'clock today for any member of the committee to submit written questions, if he desires.

Mr. JENSEN. As you know, we would be happy to respond to those.

Senator HATCH. We appreciate that. I should note for the record that since you will be on the agenda for tomorrow, for markup, there should be no time limitation on your responding. Although we fully intend to report you out tomorrow from the committee and to the floor for immediate action, hopefully you will still answer these questions for the benefit of the members.

Mr. JENSEN. They will be answered, Senator; we will do that in an expeditious fashion.

Senator HATCH. That will be great; I believe Senator Mathias is the only one who has any remaining questions. I think what we will do is recess—I will go vote as well—until he can come back and resume his questions. We will then hopefully end the committee function here today.

I apologize for the delays. It's just one of those things.

Mr. JENSEN. I understand that, Senator.

Senator HATCH. You understand that better than most.

Mr. JENSEN. Well, I have been at this business of continuances and delay since——

Senator HATCH. Well, thank you so much. We will recess till Senator Mathias returns.

[Brief recess.]

Senator MATHIAS [presiding]. Mr. Jensen, I appreciate your waiting.

Mr. JENSEN. May I say I appreciate your coming back and keeping this moving. I really appreciate that, Senator.

Senator MATHIAS. Well, I am sorry to have to belabor all of these issues, but I think we can dispose of this matter very promptly now—we are down to the two of us—and put it to rest. And there are one or two other subjects I wanted to ask you very briefly about.

But one of the advantages, or disadvantages, depending on your point of view, of these interruptions, is that there is time for philosophical reflection while riding back and forth on the subway train. And I was just reflecting that one of the purposes of the criminal justice system is deterrence. If, as you say, it is unlikely that the disposition of the *Hutton* case would have been reached if the Justice Department had brought individual prosecutions, perhaps that might have been better. From a deterrent point of view, one or two individual prosecutions might have had more force and effect than the disgorging of $9 or $10 million by a huge company to whom $9 or $10 million is not a significant sum.

Mr. JENSEN. If I could, when we talk about deterrence, of course, there are two aspects. One is the offender, in this case E.F. Hutton—and obviously that has been stopped in terms of any specific deterrence. As far as general deterrence as to other corporations or persons out there who may be contemplating activities of this nature, I am sure that the plea of guilty here by E.F. Hutton has a deterrent impact. I don't think that we could say that there has been no such impact in terms of this kind of conduct by others. Whether or not there would be different levels of deterrence based upon individual prosecutions, I think we could make judgments about that and discuss it.

But I would be satisfied to say that in terms of what took place here, that it did have very, very important and specific deterrent impact.

Senator MATHIAS. Well, I am sure there is an element of embarrassment or shame. All the jokes that are made about the advertisement: "When E.F. Hutton talks * * *" all of that certainly contributes to a deterrent effect.

But I would think it would not amount to as much as the sight of an E.F. Hutton official at a high level, who in fact was guilty—I am not suggesting that there should be any scapegoat, I wouldn't want to be misunderstood about that—who in fact was guilty of criminal conduct, paying the price for his criminal conduct.

But to move on from that philosophical reflection, you said that the amount of restitution had been agreed in principle but not computed in figures. Was there a cap agreed to?

Mr. JENSEN. No, there was no cap as far as this was concerned; it was a process where you could identify those financial institutions, banks, that had been victimized, and then you would identify the amounts after that had taken place. So there is no cap on that figure.

Senator MATHIAS. Are you familiar with the name Robert Ogren?

Mr. JENSEN. Yes, Bob Ogren is the chief of the fraud section in the Criminal Division of the Department.

Senator MATHIAS. He is quoted as having said that the $8 million is Hutton's figure—"We didn't and never would agree to an $8 million cap." And then I think he speculated that the loss might be as high as $40 or $50 million.

Are you familiar with those——

Mr. JENSEN. Well, as I said, Bob Ogren was directly responsible in the fraud section for this case, and, as he said—as I think I have tried to point out—this was a process that was agreed to and a responsibility that was agreed to by E.F. Hutton where you identify areas of restitution, and there is no cap to that.

Now, what those specific amounts are going to be will have to depend upon that process. I don't think you can say anything about what that amount is, and——

Senator MATHIAS. And I'm not asking you about that; what I am trying to do is get the process. Will it take a further court order to determine the amount?

Mr. JENSEN. No; my understanding is that it would be a process that is within the existing agreement.

Senator MATHIAS. A process within the existing agreement.

Mr. **Jensen**. Where they identify those persons who have been victimized, where they are being sought out, notification is going out and they can now establish that, and they can establish it on an agreed-upon basis—will not take further court process. That is my understanding, at least.

Senator **Mathias**. Suppose you get into a situation where E.F. Hutton says, well, we were thinking in terms of the order of magnitude of $8 million. And if Mr. Ogren's speculation proves to be more accurate and it's more like $40 million, what happens then?

Mr. **Jensen**. Well, if there will be a need to see to it that all of the restitution that is necessary to be accomplished under this agreement is actually effectuated, we will see that that takes place.

I don't think that that's going to be a problem. I think that is just a speculation in terms of the amount, and not in terms of the responsibility or the liability of E.F. Hutton for it. I don't think there's any issue in there.

So I think what we are going to do is identify, in terms of the banks, what the level is, and then the payments will be made. I don't think there is any kind of feeling that there is going to be a failure on the part of E.F. Hutton not to live up to that agreement.

Senator **Mathias**. What about the possibility that the restitution will be smaller than it should have been because some of the banks involved look to future business with E.F. Hutton, and therefore will say, "Well, what's a hundred thousand between friends?"

Mr. **Jensen**. Are you saying that there may be instances where people do not seek restitution?

Senator **Mathias**. Yes, some of the banks won't, for reasons of the possibility of future business. They will figure they are better off taking the loss.

Mr. **Jensen**. Well, frankly, I can't see how a financial institution who is in that position can make that judgment; they have responsibility to the institution itself, and if they find that there is a liability by E.F. Hutton of any amount within this restitution order, I can't see any financial institution not processing that.

Senator **Mathias**. But there is a danger, it seems to me, that we could set a precedent in this case. This is a precedent-setting time because we are all sensitive to the rights of the victims of crime. There is a new awareness of the position of the victims of crime. We could set a precedent that we compensate only those victims who have the courage and the strength and the ability to step forward and demand restitution. And those who, for one reason or another, feel weak or are required to stand mute, won't get compensated.

Mr. **Jensen**. I think what we have done in terms of precedent setting is that this is a disposition that includes about as high a level of restitution and attention to that kind of issue as we have ever accomplished.

I think that the positive things that have been done here is to achieve a level of agreed-upon restitution that will now be put into a mechanism where we will identify the people that have suffered that loss—they have a mechanism by which they can bring it to fruition. I think we have put in place a restitution mechanism that is really a very, very positive accomplishment. There are always issues in terms of making sure that we accomplish that for victims—but that is what we have done here, that is what that process is for.

I think this is a very major step forward, rather than anything else. The precedent it sets is that we are going to ferret out and hold people responsible for that restitution at very high levels.

Senator MATHIAS. And you feel it's possible that the Department can ensure that the ultimate victims who are the depositors and the stockholders in these banks will get fair treatment even though the officers of the banks may be reluctant to make the claim?

Mr. JENSEN. Well, I don't know that there would be any such reluctance, as I say. But I am certain that the agreement will contemplate that those persons who have been put into a position where they have suffered losses have this mechanism, they can make it available, and I am sure that that will be effectuated.

I would also say I don't see anything to indicate that there would be any reluctance on the part of E.F. Hutton to do that.

Senator MATHIAS. The vice chairman of Hutton is now the Chairman of the Securities and Exchange Commission, Mr. Shad.

Have any steps been taken to investigate whether he knew anything about the check-kiting operation?

Mr. JENSEN. I don't know that I would be able to respond to any investigate step. We wouldn't make a statement about an investigation.

But I don't think there is anything to suggest that Mr. Shad had any such knowledge.

Senator MATHIAS. I am not, by my question, suggesting it; it's just that he is in an extraordinarily delicate and sensitive position today, and he was previously in a position where he might have been exposed to some knowledge on this subject.

It's the kind of question that we can't avoid simply because it is delicate.

Mr. JENSEN. I can't give you a specific response to that, Senator.

Senator MATHIAS. You are unable as a matter of your personal knowledge or is it a matter of your official responsibility.

Mr. JENSEN. You are putting me in this situation are you going to launch an investigation, that sort of thing—we are concerned about any responsibility in this area, and, as you say, it is a delicate matter, but I see nothing to suggest that there was any knowledge on his part.

Senator MATHIAS. So you have made no inquiry?

Mr. JENSEN. I don't know what levels; I wouldn't be able to discuss specific investigative steps that were taken along that way, saying that's the result.

Senator MATHIAS. Could you tell the committee if you have made any investigative step in that respect?

Mr. JENSEN. Maybe I could respond to that—we would respond in the letter we send back up. I would not be able to respond right now.

Senator MATHIAS. Is there any legal impediment at the present time to the prosecution of individuals, or would that be a violation of the agreement?

Mr. JENSEN. The only impediments may be that there may have been instances—we have already discussed there could be—well, the legal impediment may be instances of immunity; there may be other instances where it is a part of an agreement. I don't know of any other legal impediment.

Senator MATHIAS. Well, I will look forward with great interest to your further response in this whole matter, and to perhaps rejoining this discussion in the light of whatever information the Department is able to provide.

Mr. JENSEN. We would be happy to do that, because we wouldn't want to leave it in such a situation where there are questions that are out there, where there are misperceptions. I think that's very important, and that's why I think we would like to be able to make it clear that our investigation was thorough and comprehensive and that our judgment was made with reference to the best disposition of this case, which I say I think has been accomplished, and would like to make it clear in terms of any kinds of issues out there—you have asked a question, say, for example, about whether or not there was a "mastermind"—we will give you a response on that.

But I would like to be able to make clear that we are not saying that there was anything that led to anything other than an investigation that was thorough in this regard, and that we would not like to suggest that there was some evil genius behind this specifically identified. To the extent that there has been any suggestion like that, I would like to be able to say we really don't want to say that.

Senator MATHIAS. That was not my word.

Mr. JENSEN. Well, that's why I would like to make sure that we are not getting into anything where—that's why I would like to have an explanation of that in terms of what kinds of level of responsibility were probed through.

Senator MATHIAS. I can see that the term "mastermind" seized your imagination as it seized mine.

Mr. JENSEN. That's why I would like to be able to get that—that we don't leave any misperception about that.

Senator MATHIAS. Can we turn for just 1 minute to the NCIC, the computerized data system run by the FBI in the National Crime Information Center, which is now nearly 20 years old, and has grown far beyond its original mission.

Law enforcement agencies on the Federal, State, and local levels make use of it nearly half a million times every day, which is a testimony to its usefulness. Each day 500,000 inquiries are processed.

And I suppose that information about a substantial percentage of the American population is now either indexed or included in the system.

The statutory authorization for the National Crime Information Center, is really based upon a statute which predates the system; it's simply an authorization to the Attorney General to acquire, collect, classify, and preserve certain records.

My question is whether you have reflected upon whether it is time to bring Federal law up to date with the reality of computerized handling of information, which is something totally different than we have had any human experience with up to this time.

Isn't it time to enact legislation which specifically authorizes the NCIC, provides it with authority to operate, provides it with guidelines, brings it under some kind of rational control. Because, as it grows, as it expands, as it becomes more useful, it also of course carries with it the potential of great danger.

Mr. **Jensen**. I don't know that there is such a need. I did have the chance to serve when I was a local prosecutor as one of the members of the NCIC advisory board, and, as I say, I served on that board for awhile. And the notion that it is not systematically and rigorously monitored and supervised and has a very high level of control within the FBI and within the law enforcement community is not correct; it is very rigorously looked at and very rigorously controlled.

Senator **Mathias**. I didn't mean to imply that—but it is not rigorously controlled within the statutory guidelines.

Mr. **Jensen**. As I say, I think what is accomplished now is a very high level of supervision, and anything that goes on to that system is very carefully reviewed. If there is a need for legislation—I don't have any problem with looking at that, because I think the NCIC, as you pointed out, is a tremendously useful system. My basic feeling is that it is foolish for law enforcement not to have available the highest technology that is out there, and that we need to take advantage of every bit of technology that is there—the criminals and the crooks do. So it's up to us to do that. I don't think there is a gap as far as that legislation is concerned, but I would be certainly happy to look at it, because I want to make sure there is no problems with that at all.

Senator **Mathias**. Well, I would be grateful if you would look at it, and look at it particularly in the light of the proposal to study what the NCIC should look like in the year 2000. You are familiar with the study.

Mr. **Jensen**. Yes, sir.

Senator **Mathias**. And, again, I am not critical of it. In fact, I think it's very good to look at what it should look like in the year 2000. It may be a fruitless kind of a study because who would have imagined 20 years ago that computers would have the capacity that they have today? And there may be an equally startling change in technology between now and the year 2000.

But it's worth doing, even though we recognize the possibilities that things will turn out differently than we anticipated.

But it does seem to me, since you have worked very closely with the NCIC, both since you have been in the Department and in your previous incarnation as a prosecutor, that you would have some thoughts on how it should be controlled and how it should be made more effective and more useful.

I would hope that you would look at it, and I am grateful for your offer to do so.

Mr. **Jensen**. I would be happy to do that. I hope that my present incarnation includes a concept of being a prosecutor still. But I would be happy to do that. And I think NCIC is one of the areas where we have had tremendous growth and tremendous productivity.

And I would like to see us at the year 2000 take advantage of technology and actually keep abreast in terms of the management and the legislative construct that we need for it. So I totally agree with you, Senator.

Senator **Mathias**. Let me just be specific about some of the things that could be examined. In the last few weeks there has been a proposal that NCIC establish an economic crime index, and that would consist of the names and the identifying information on individuals suspected of white-collar crime.

Well, not to dredge up E.F. Hutton again, but that would mean that everybody that works at E.F. Hutton, including Mr. Shad, might end up by that criterion in the NCIC. It concerns me that someone could get on the index not because he has been convicted or even indicted, or even because there is enough evidence for the issuance of an arrest warrant. Just exposure to the facts of a criminal scheme might end up by getting you put into the NCIC. And then that information would be accessible to a wide group of people who now have access to the system around the country.

Mr. **Jensen**. I think what you are addressing is a major concern, but I don't think that that is what that index would do.

The index doesn't contemplate——

Senator **Mathias**. We agree it's not what it should do.

Mr. **Jensen**. Absolutely not—you should not make available in some kind of form now material that simply associates persons with criminal investigations. That's not what it does. It doesn't change the criminal investigative process at all.

And the only contemplation is that you would have the same kind of communication that could be accomplished by investigative units that now talk to one another. If you have fraud people in one police department who have an investigation going and they have some reason to believe that there is a cross-over in another jurisdiction, they may make a phone call to find out, and they are not going to get raw material that is just associative; they are going to get material about investigative targets, people who are subjects of investigation.

The only thing that index would do would be the same thing, is that you would put on the index the fact that there was an investigation in a formatted form for a subject under the regular kinds of control of investigations, and then if another police agency put on the same kind of information, that would be noted—they wouldn't have access to the material, that's not contemplated at all. All they would have is a pointer system that would say that instead of having to rely upon random phone calls across the country, you would be able to use a pointer system that uses technology.

Senator **Mathias**. Well, I think you would have to be careful about altering the present rather rigid rules for entry of data, because, as I understand it, nothing goes in there now except matters of record.

Mr. **Jensen**. Well, what goes in there now, Senator, would be matters of record in the sense that we are talking about—court records that produce warrants. Basically we have in that system either court records of warrants or we may have criminal histories that come out of court records.

However, there is a great deal of information that is in that system now that is essentially investigative information that doesn't go through court process. We identify stolen vehicles, stolen guns, stolen property—all those are part of investigative processes; they are not part of court records.

We have in there now reports in terms of missing children, for example, that are investigative process; they are not part of a court record in that sense.

So you have got a mix now of court records that are produced either by warrants or by criminal histories. And you have got investigative materials.

Senator MATHIAS. You've got the lookout list.

Mr. JENSEN. That's correct; that was one area where specific subjects—and very, very tightly controlled—and I know that was a matter of concern, but that is a good example of how a very productive kind of file was put on NCIC, and it was done in a fashion that is under tight control, and it's a very useful file.

Senator MATHIAS. All of these reasons, all of these facts, seem to me to justify a very careful review of where we are as we think about where we are going to be.

And I would appreciate your doing that.

What is the present status of the proposal to establish the economic crime index as part of the NCIC?

Mr. JENSEN. It is being reviewed by that advisory board and by the FBI. I may have mentioned before, the so-called economic crime council within the Department—this proposal was actually developed there as part of enhancing investigations in the white-collar crime area, and it was discussed with the FBI—they are members of that council—and it's been put forward to the NCIC advisory board, and they are developing an experimental kind of design system right now.

So we would contemplate that once that is accomplished in terms of the specific design, after we have gone past that concept, we would then be putting on such a pointer system.

I have had the opportunity to testify before the House committees on this area, and would be happy to keep the Committee apprised of that along the way.

Senator MATHIAS. I was going to make that request, that you keep us——

Mr. JENSEN. I would be happy to do that. When we have designed a specific system, we would let you know what we put in place and what we contemplate.

Senator MATHIAS. And if you would include any advance that has been made on the question of data quality. You may recall in 1983 we had a hearing on the question of data quality in the NCIC.

And I would be interested in knowing what the evaluation of the Department is on data quality.

Mr. JENSEN. Data quality.

Senator MATHIAS. Another recurring problem, of course, is dissemination outside the criminal justice area, whether employers and licensing agencies should have access to arrest records, especially where there has been no conviction.

If you could also include that as part of the——

Mr. JENSEN. That would be a part of the design. As I say, we don't contemplate any kind of direct access using NCIC to get into investigative files. We contemplate only use of pointer systems by those people who are now under very rigid control in terms of who has access to an NCIC terminal itself.

Senator MATHIAS. One final and terminal question, which is parochial. Even though you claim residence on the south bank of the Potomac, you can hardly have escaped notice of the fact that we are having some concerns in the State of Maryland over the plight of savings and loan institutions.

The attorney general of Maryland has begun an investigation into allegations of criminal conflict of interest. Some of these may be institutions that are not federally insured; some of them may or may not be engaged in some form of interstate commerce.

So I am not sure what the jurisdiction of the Department of Justice would be.

But there may be violations of some Federal law. In 200 years we have managed to pass an act of Congress on almost every subject. I am wondering if the Department of Justice has taken a look at the situation of savings and loans in Maryland, and——

Mr. JENSEN. I wouldn't be able to say whether or not there has been any direct reference to that from your Attorney General or from the regulatory agencies. Let me say this, however. The whole notion of flowing information in an efficient way to deal with the problem of financial institutions has recently been addressed by us, and I think in a way that is the kind of thing that you would agree with, in this sense—that we have talked with our regulatory agencies in the Federal scheme to make sure that we are getting early and complete kinds of referrals of potential criminal matters, and that has been accomplished with reference to agreements in the regulatory agencies. If they have got anything in the Maryland situation that comes to their attention in their jurisdiction, that would come to is.

Senator MATHIAS. It would what?

Mr. JENSEN. It would come to us through that process.

Senator MATHIAS. And what would you do with it?

Mr. JENSEN. Well, given whatever jurisdiction we have, we would now start in in terms of whatever investigative responsibilities that would be called for. The whole point is to identify it as early as we can and to identify it in such a fashion that the regulatory agencies who come across this information now pass it on to the Department of Justice as quickly as is necessary.

We have got that in place in the Federal system. If there is anything that is there—I am sure that we have had through contact with your Attorney General that there is no problem in terms of our making available any kinds of investigative——

Senator MATHIAS. All of this investigative information which is adduced would be available to the attorney general of Maryland at his request?

Mr. JENSEN. I am sure if there is anything that we can do to coordinate or cooperate in a fashion where we are able to do it lawfully and responsibly, we will.

Senator MATHIAS. Well, I would make a personal request that you do provide him with every cooperation you——

Mr. JENSEN. Well, I'll make sure—we will speak to the U.S. attorney and make sure that that contact is made, and see that we follow up on it.

Senator MATHIAS. Well, we appreciate your patience this morning and willingness to address the various questions. I think that you will understand the interest that is exhibited by members of the committee in these subjects.

Mr. JENSEN. I certainly do, Senator, and I appreciate, as I say, your forebearance and courtesy in continuing this hearing.

Senator MATHIAS. Thank you very much for being here. Once again, congratulations and best wishes for your new responsibility.

Mr. JENSEN. Thank you.

Senator MATHIAS. The committee stands adjourned.

[The committee adjourned at 12:53 p.m.]

BIOGRAPHY

D. LOWELL JENSEN

NOMINEE, DEPUTY ATTORNEY GENERAL

Birth: June 3, 1928, Brigham, UT.

Legal residence: Virginia.

Marital status: Married to Barbara Jane Cowin, 3 children.

Education: 1945-52—University of California, B.A. degree (1949), J.D. degree (1952).

Bar: 1953—California.

Military service: 1952-54—U.S. Army (corporal).

Experience: 1954-66—Assistant District Attorney, Alameda County, CA; 1966-70—Deputy District Attorney, Alameda County, CA; 1970-81—District Attorney, Alameda County, CA; 1981-83—Assistant Attorney General, Criminal Division, Department of Justice, Washington, DC; 1983-present—Associate Attorney General, Department of Justice, Washington, DC.

CONFIRMATION HEARING ON J. FREDERICK MOTZ

WEDNESDAY, MAY 22, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p. m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, McConnell, and Simon.

Staff Present: Duke Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN, STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met this afternoon to conduct a hearing on J. Frederick Motz, of Maryland, to be U.S. District Judge for the District of Maryland. Senator Mathias, the senior Senator, is a member of this committee and I am going to ask him to conduct the hearing. He is a ranking member here and a very influential member.

Senator Mathias, it is a pleasure to turn it over to you. I see Senator Sarbanes here, too, and I understand you have got the full support of both these Senators and you are very fortunate. I congratulate you on being appointed and congratulate you especially on having the fine support of both of your able Senators.

Mr. MOTZ. Thank you, Senator.

The CHAIRMAN. Senator Mathias, you take over. I will just turn it over to you.

Senator MATHIAS [presiding]. Thank you very much, Mr. Chairman.

It is a pleasure for me to welcome Fred Motz to the committee, but before we address him directly, let me call on the Senator from Maryland, Mr. Sarbanes.

STATEMENT OF HON. PAUL SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Thank you very much, Mr. Chairman. I am pleased to be here today to recommend very strongly the confirmation of Fred Motz, of Baltimore, to serve on the U.S. District Court for the District of Maryland.

He will bring to the Federal bench an outstanding record of professional and public service. Fred Motz graduated with honors from Wesleyan University in 1964 and the University of Virginia Law School in 1967. He was admitted to the bar in Maryland in 1967, and in his first year as a member of the bar he was the law clerk to now Chief Judge Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit.

Following that, he joined the leading Baltimore law firm of Venable, Baetjer & Howard; left that firm from 1969 to 1971 to serve as an assistant U.S. attorney; then went back to the firm, became a partner in 1976, and in 1981 he was appointed by President Reagan to be the U.S. Attorney for the District of Maryland, where he has served with great distinction since July of that year.

Fred has been involved in litigation throughout his legal career both in public and private practice, both civil and criminal. His wife is the chief of litigation, as a matter of fact, for the State attorney general in Maryland. I gather they leave the litigation behind them in the evenings at home.

It is also, I think, important to note that Fred Motz, in addition to a very active, successful, and responsible professional career, has been very much involved in the community.

He served on the Baltimore City Social Services Commission and has played a leading role in the activities of the Baltimore Friends School and, in all of those activities, reflected a strong sense of community responsibility.

Mr. Chairman, when we were both younger, we were neighbors for some years; our backyards, in effect, adjoined one another. So I think it is fair to say that I know Fred Motz well. I know his temperament, I know his character, I know his abilities.

By integrity, by his intellectual powers, by his independence and balance of judgment, and by his commitment to the highest standards of equal justice for all, he is extremely well qualified to be a U.S. district judge, and I very strongly recommend his confirmation to this committee.

Senator MATHIAS. Thank you very much, Senator Sarbanes. I join you in that recommendation. Fred Motz, I think, has the experience, energy and expertise to be an outstanding Federal judge and I am confident that the full Senate will confirm his nomination very rapidly.

With all of his expertise, he is still young. I notice Senator Sarbanes used the right adjective. He did not say, "when we were young," he said "when we were younger." [Laughter.]

It calls to mind the statement that Alben Barkley made when he was entering a new phase of his public career; that he was old enough to know what to do and young enough to do it. I think that certainly applies to Fred Motz.

He will bring to the Federal bench nearly 20 years of experience as a litigator in Federal courts and in State courts. He is a graduate of Wesleyan and the University of Virginia Law School.

This pale sunburn that I am sporting today is a result of having attended the University of Virginia Law School graduation on Sunday. Because of that recent experience, I have an even greater respect than I had before for the University of Virginia Law School and for its graduates.

As Senator Sarbanes has said, he served as assistant U.S. attorney, and in 1981 was chosen by President Reagan to be U.S. attorney. And I think he can take great pride in his 4 years of presiding in that office. He has the reputation of being a tough prosecutor, but a fair prosecutor.

I think of great importance is his reputation as a capable administrator, which is an extremely important aspect of any public office. All of these factors are pertinent to his qualifications for judicial responsibilities.

I think it is worth noting that this conclusion is not only a personal one shared by Senator Sarbanes and myself, but also shared by a distinguished panel of Marylanders, a nonpartisan group convened to screen candidates for the judgeship.

The panel had 10 members: lawyers, civic leaders, and other citizens who met under the leadership of Hewlett Henry. They reviewed scores of résumés, interviewed dozens of candidates, and whittled the field down to a short list of the most highly qualified contenders.

That process has resulted in the fact that the President of the United States has nominated Fred Motz, and he is before the committee today. I think his nomination is evidence that the selection process is working well and that we will maintain the historically high quality of judges that has ornamented the Federal bench in Maryland. So I join with Senator Sarbanes in commending Fred Motz to the committee.

Senator McConnell.

Senator McCONNELL. Mr. Chairman, I just wanted to stop by on the way to another meeting and congratulate Mr. Motz on his nomination. I am sure he will be confirmed and I look forward to watching his performance on the bench. Thank you.

Mr. MOTZ. Thank you very much, Senator.

Senator MATHIAS. Mr. Motz, in accordance with the custom of the committee, will you rise and take an oath?

Raise your right hand. Do you swear that the testimony you will give in this hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. MOTZ. I so affirm.

Senator MATHIAS. Mr. Motz, you have just heard Senator Sarbanes commenting on how your past experience will prepare you for your new duties as judge. It is an opinion that I share, but how do you view it? Has your experience in the U.S. attorney's office, both as assistant and in charge, and your private practice and your other experience prepared you for service as a Federal judge?

STATEMENT OF J. FREDERICK MOTZ, OF MARYLAND, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND

Mr. MOTZ. Senator, I think that the—first, I would like to thank you and Senator Sarbanes for the very nice things that you said about me.

I think that the fact that I have had litigation experience is of paramount importance. It will help me as a judge if I am confirmed to understand the problems that lawyers have who appear before me wanting well-reasoned decisions within a reasonable period of time, and a judge who will control the courtroom, but at the same time let the lawyers try their cases.

I think the fact that I have had both civil and criminal experience—criminal experience from both sides of the aisle—is important. The fact that in my civil practice I did handle a wide variety of cases, including personal injury cases, to complex questions involving Federal jurisdiction are ones which will help me to have had that experience.

The fact that, as U.S. attorney, I have tried already to judge in the sense of knowing what cases to bring, what cases not to bring, what positions to advance, which ones not to advance—and I think that my experience as an administrator in that office will be helpful to me because, as you know, one of the problems facing the Federal courts is the tremendous docket which every judge must handle.

And I think that to have had some ability or some experience in administering caseloads will stand me in good stead. My greatest qualification, Senator, was something which is the most fortunate thing which happened to me, was in 1968 when I married Diana because one qualification that I know that I have is that I have a wonderful wife and family with great senses of humor who will not let me get too full of myself.

Senator MATHIAS. The committee is delighted to note that Mrs. Motz is in the room, and we would want to extend a special welcome to her and we are very happy that she is here.

I believe your sister is also here.

Mr. MOTZ. Yes; and my father-in-law has come as well.

Senator MATHIAS. It is always encouraging when members of a judicial candidate's family are here. It gives the committee a sense of the strong support that they have and that they undoubtedly do need and will need in the course of serving as a Federal judge. So we are happy to welcome you all.

There is no guarantee that a Federal judge will be insulated from every manner of conflict of interest, but the question arises how that conflict will be resolved. I am wondering if you have given any thought to the procedures that you would follow in determining potential conflicts of interest and how you intend to resolve them.

Mr. MOTZ. Senator, I have already had informal discussions with our Chief Judge about various conflict issues. Obviously, matters which were in my office while I was the U.S. attorney are matters which I should not handle, and matters involving the State of Maryland.

Because, as Senator Sarbanes indicated, my wife is the chief of litigation for Maryland, I essentially will, I think, with the concurrence of the other judges, be forced to disqualify myself in cases involving the State, with the possible exception, because my conscience makes me think that I had better handle my fair share of these cases, of prisoner cases, habeas corpus cases and the like. But that is the kind of thing which I think is an automatic conflict.

There are various other cases in which there is an automatic conflict. I would disqualify myself. In cases where there might be an appearance of conflict, I would bring it to the attention of counsel, recognizing that I finally would have to make a decision in a case where I felt that there would be a problem because it is not fair to impose that obligation upon counsel. I would make that decision.

But if it is one where the question more lies in the subjective problems of counsel or their clients, I would certainly offer to recuse myself. But in cases in which I am not conflicted out, I have a responsibility to handle, and will do so.

Senator **Mathias**. Of course, the incidence of any conflict arising from your private practice is likely to be reduced by the fact that you have been out of private practice for 4 years, so that that should not be a major problem. But you would recuse yourself if anything should arise in that field?

Mr. **Motz**. That is a difficult question in terms of whether that is an automatic conflict. I have been away from the firm for 4 years. I have no continuing financial relationship other than through a pension fund, which I do not understand under the law is a conflict.

There are practical problems in terms of being disqualified in all cases in which my former firm may have been involved. That is something I have discussed with the other judges.

I think my own preference would be not to handle any cases for a period of time, but that may not prove to be practical. But that certainly is a category of cases in which I would bring at least to the attention of counsel the prior relationship.

And, obviously, if I had worked on the case myself or a lawyer in the firm with whom I had worked very closely for some period of time, I would disqualify myself.

Senator **Mathias**. In response to a portion of the committee's questionnaire concerning the subject of judicial activism, you wrote, and I am quoting from your answer:

> These qualities of mind and temperament are reflected by a due regard for constitutional, jurisdictional and procedural checks upon the exercise of judicial power and by a proper respect for the decisions of those whose actions are subjected to judicial review. Of course, a judge must finally decide any question in accordance with his or her own conscience.

How would you decide a question that arose out of a conflict between your own conscience or your own personal sense of justice and what you perceive to be the clear meaning of a statutory provision or a constitutional provision?

Mr. **Motz**. Senator, if there was a clear meaning to a statute or a constitutional provision, that is something which I would, by virtue of my sworn duty, would be required to apply the law as I understood it.

As a philosophical matter—and I do not understand this or do not expect it to arise—but as a matter of philosophy, if my conscience forbade me to apply the law under those circumstances, my obligation would be to resign my office. But as long as the statute was clear, I would have to follow what the statute said.

Senator **Mathias**. I have just one question, then I want to yield to Senator Simon. There was an article in the Washington Post on April 27 of this year, in which the headline read, "Indicted Maryland Firm Accuses the IRS of Altering Documents."

The article stated that "attorneys for a Rockville-based jet airplane trading company indicted in a multimillion-dollar tax fraud case here have accused a Federal prosecutor and several Internal

Revenue agents of altering or creating documents to prevent dismissal of the case by a Federal judge."

Now, as you know, the Federal prosecutor referred to is a member of the staff of the U.S. attorney's office in Baltimore. Can you tell the committee what actions you have taken to investigate these allegations?

Obviously, we are restrained by the usual rules that surround judicial proceedings and I am not asking you to violate those rules, but tell us what you can about this matter.

Mr. MOTZ. Yes, Senator. As soon as I realized the seriousness of the allegations which were being made, which was at a relatively early stage of the proceedings, I readjusted my own schedule so that I could be in the courtroom when significant witnesses were testifying—IRS agents, members of my own staff—so that I could personally judge their own credibility; I could personally make a judgment of their credibility.

We were then under a sequestration order; I could not conduct an independent investigation after the testimony was concluded. And I was able to conduct interviews. I, again, interviewed assistants, agents. Sometimes, the sessions were rather heated and tense, but I asked the questions which I felt should be asked.

As a result of my investigation, I concluded that neither my assistants nor the agents had either obstructed justice or committed perjury. That is my conclusion, recognizing that I may be in an ambivalent position. I nevertheless referred the matters to the office of professional responsibility of the Department of Justice and the inspection division of the Internal Revenue Service.

Judge Black has pending before him motions which will require him to reach some of these issues. We will file our response in court in the near future and Judge Black will rule upon the allegations himself.

Senator, I probably should add that I have not personally been accused of wrongdoing during the course of those proceedings. I know defense counsel disagree with me for not dismissing the indictment. They think I should and am making the wrong judgment, but they have not accused me of any misconduct.

Senator MATHIAS. I am glad you added that because that was the question I was just about to ask you.

Let me yield to Senator Simon, then I think we will both have to go to the floor for a vote.

Senator SIMON. Thank you.

Senator MATHIAS. I will ask a member of the staff to call the floor and see how much time we have.

Senator SIMON. I have been designated the Democratic point man on these judicial nominations, Mr. Motz, and I have to say that, in general, the reports we have received are excellent on you.

There is one note that I would just like to ask your comments on. The American Bar Association's Code of Judicial Conduct says, among other things, "It is inappropriate for a judge to hold a membership in any organization that discriminates on the basis of race, sex or religion."

The Federal records indicate that you were a member of the Elk Ridge Club until the first of the year—a club that did, in fact, discriminate. Would you, as a judge, refrain from that kind of involvement? Do you care to comment at all?

Mr. MOTZ. I certainly would not intend to be a member of any club which discriminates and I certainly would hope that my life indicates that in what I have done. In terms of the Elk Ridge Club itself, as a formal matter, I think the only de jure discrimination is against women, and I am not even sure that that is accurate because there are women who bear some kind of membership in the club.

As a de facto matter, I think there was discrimination. I will say quite candidly that I was aware of that when I became a member of the club. It was a compromise of conscience when I did it.

It is a club which is in our neighborhood. It is something which is—it is a club which is wonderful for my family, in a way. We could swim and play golf and play tennis there, and I did compromise my conscience.

I think the fact that at that time my name was considered for possible nomination, I thought, No. 1, it was inappropriate even under those circumstances for me to continue to remain a member, and also made me do some hard thinking, and I think that I have done the right thing in resigning, although speaking for the club I should say that it would not take the position, I think, that it discriminates.

Senator SIMON. Well, you did do the right thing. Let me just ask you—according to information I have, the club has no minority members, one Jewish member, no women members. Did you at any point express concern about that policy to other members of the club?

Mr. MOTZ. I expressed concern to other members of the club. I never took any official action because I thought—I did not think it would be fruitful to do so. But I have been concerned about it. It is something which I say—when I did it, it was a compromise of conscience for reasons of my family and I think it is entirely appropriate that I resign.

Senator SIMON. And the policy is one you personally—I should not put words in your mouth, but the policy is one you personally disapprove of?

Mr. MOTZ. Senator, I cannot more strongly disapprove of any policy which involves discrimination in the popular sense. When I say that, discrimination is a word which is a grammatical matter that sometimes is overused.

But I certainly am against anything which is invidious, anything which is racial discrimination, sexual discrimination, religious discrimination, discrimination against the handicapped, and I hope that not only am I against it, but that my record demonstrates that I take affirmative steps to try to cure discrimination, which, without positive action, may exist by inertia.

Senator SIMON. Well, I thank you; I appreciate your solid statement. And I thank you very much, Mr. Chairman.

Senator MATHIAS. Thank you, Senator Simon.

Since there is a rollcall which is approaching its end, if there are no further questions, we congratulate you again. The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 2:25 p.m., the committee was adjourned.]

BIOGRAPHY

J. FREDERICK MOTZ

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MARYLAND

Birth: December 30, 1942 Baltimore, MD.

Legal residence: Maryland.

Marital status: Married to Diana Gribbon Motz, two children.

Education: 1960-64—Wesleyan University, A.B. degree; 1964-67—University of Virginia Law School LL.B. degree.

Bar: 1967—Maryland.

Experience: 1967-68—Law clerk, Hon. Harrison L. Winter, U.S. Court of Appeals for the Fourth Circuit; 1968-69—Venable, Baetjer & Howard, associate; 1969-71—Assistant U.S. Attorney, District of Maryland; 1971-81—Venable, Baetjer & Howard, associate (1971-75), partner (1976-81); 1981-present—U.S. attorney, District of Maryland.

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